SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 567

SPIELMAN MOTOR SALES CO., INC., APPELLANTS,

vs.

WILLIAM C. DODGE, AS DISTRICT ATTORNEY OF NEW YORK COUNTY, STATE OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SPIELMAN MOTOR SALES CO., INC., Complainant-Appellant,

against

WILLIAM C. DODGE, as District Attorney of New York County, State of New York, Defendant, Appellee.

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following enumerated papers constitute the papers to be printed in the Record on Appeal in the transcript of the record, and the same are true copies of the originals on file in the above Court:

1. Order to Show Cause.
2. Bill of Complaint.
3. Exhibit A—Code.
4. Exhibit B—Laws 1933, Chapter 781.
5. Affidavit of David Spielman dated August 1, 1934.
6. Affidavit of S. Frederick Placer dated August 2, 1934.
7. Affidavit of Edna Sperl Burke, dated July 23, 1934.
8. Affidavit of Harold Pefit, dated July 21, 1934.
9. Affidavit of Alexander J. Russell dated July 21, 1934.
10. Affidavit of Henry Caplan dated July 22, 1934.
11. Affidavit of George Shapiro, dated July 22, 1934.
12. Order dated August 8, 1934.
13. Affidavit of John B. Hulitt dated August 16, 1934.
14. Affidavit of Harold H. Straus, dated August 15, 1934.
15. Affidavit of Jack Frost, dated August 15, 1934.
16. Exhibit A, Nat. Auto Dealers Assn.—Release.
17. Exhibit B, dated December 11, 1933.
18. Affidavit of K. J. Ammerman dated August 15, 1934.
19. Affidavit of K. J. Ammerman dated August 15, 1934.
20. Exhibit A, dated June 16, 1933.
21. Exhibit B, dated July 15, 1933.
22. Exhibit C, dated July 15, 1933.
23. Exhibit D, dated September 8, 1933.
24. Exhibit E, dated September 5, 1933.
25. Exhibit G, dated April 28, 1934.

26. Exhibit I, dated December 30, 1933.
27. Affidavit of Ralph Ebbett, dated August 15, 1934.
28. Affidavit of Hiram Bates Pope, dated August 15, 1934.
29. Exhibit A (Test Poll).
30. Exhibit B (Test Poll).

[fol. 3] 31. Affidavit of Oscar F. Pearson dated August 15, 1934.

32. Exhibit A, List of passenger car manufacturers.
33. Affidavit of Albert Blogg Unger, dated August 16, 1934.
34. Form Affidavit—57 signatures.
35. Affidavit of Mr. Spielman dated August 28, 1934.
36. Affidavit of Gabriel Cohen, dated August 28, 1934.
37. Exhibit A, dated August 14, 1934.
38. Affidavit of John B. Hulett, dated September 8, 1934.
39. Exhibit A, Resolution Union Auto Trade Assn.
40. Exhibit B, Resolution, N. J. Automotive Trade Assn.
41. Affidavit of Ralph Ebbert, dated September 7, 1934.
42. Affidavit of Stephan Boyers dated September 7, 1934.
43. Affidavit of Irene Keenan, dated September 8, 1934.
44. Affidavit of John G. Gross, dated September 8, 1934.
45. Affidavit of Louis H. Wessels, dated Sept. 6th, 1934.
46. Affidavit of G. E. Porter and H. V. Flannery, dated September 5, 1934.
47. Affidavit of John G. Gross and Gerald Foley, dated September 7, 1934.
48. Affidavit of Jack Frost, dated September 6th, 1934.
49. Motion to dismiss Bill of Complaint.
50. Opinion.
51. Final Order dated October 18th, 1934.
52. Order allowing Appeal.
53. Assignment of Errors.
54. Bond on Appeal.
55. Notice of Appeal.
56. Statement of Points to be relied upon.
57. Præcipe.

Dated, New York, November 27th, 1934.

Miller, Paul & Placer, Attorneys for Plaintiff-Appellant.
David Blitzer, Attorney for Defendant-Appellee.

So ordered.

Manton, U. S. D. J.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

Upon the Bill of Complaint herein, duly verified the 1st day of August, 1934, and on file with the Clerk of the above mentioned Court, a copy of which is annexed hereto and made part hereof, the annexed affidavits of David Spielman and S. Frederick Placer, duly sworn to the 1st day of August, 1934, and the annexed affidavits of respective motor vehicle dealers, it is

Ordered, that the defendant, William C. Dodge, District Attorney of the County of New York, State of New York, show cause at a term of this Court duly convened pursuant to Section 380 of the United States Code, to be held in and for the Southern District of New York, in the United States Courthouse, Post Office Building, in the Borough of Manhattan, City and State of New York, on the 7th day of August, 1934, at 10:30 A. M. in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein enjoining, restraining and prohibiting the defendant herein, his deputies, assistants, servants, agents and/or employees, and successors, pendente lite from in any way or manner, by suit at law or in equity or by way of criminal prosecution or otherwise, [fol. 5] enforcing as against the complainant herein any of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, Complainant's Exhibit "A", annexed to the Bill of Complaint herein, more particularly, but not exclusively, Article IV thereof, under and by virtue of Chapter 781 of the Laws of 1933 of the State of New York, by reason of the unconstitutionality of the said Chapter 781 of the Laws of 1933 of the State of New York, as is more fully and at length set forth in the Bill of Complaint and affidavits annexed hereto.

Sufficient reason appearing therefor, let a copy of this order and the papers upon which the same is based be served upon the defendant herein, and on John J. Bennett, Jr., Attorney General of the State of New York, and the Honorable Herbert H. Lehman, Governor of the State of New York, as provided by Title 28, Section 380, of the

United States Code, on or before the 6th day of August, [fol. 6] 1934, which said service when so made shall be deemed sufficient.

Dated, New York, August 3rd, 1934, Southern District of New York.

Woolsey Judge of the United States District Court,
Southern District of New York. C. W.

[fol. 7] In United States District Court, Southern District of New York

[Title omitted]

Bill of Complaint

To the Honorable Justices of the District Court, for the Southern District of New York:

Complainant above named, by Miller, Paul & Placer, its attorneys and solicitors, complaining of the defendant, respectfully alleges:

First: That at all the times hereinafter mentioned and ever since the year 1923, Spielman Motor Sales Co., Inc., was and still is a corporation, duly incorporated and existing under and by virtue of the Laws of the State of New York, and at all the times hereinafter mentioned, was and still is engaged in the business and trade of buying and selling motor vehicles, motor vehicle parts and accessories, and the general service and repair of motor vehicles, and except for the manufacture of automobiles and parts, is engaged generally in the motor vehicle business.

Second: That the complainant has conducted and operated and still does conduct and operate its business within [fol. 8] the territorial confines of the said State of New York, having its principal place of business in the Borough of Brooklyn, County of Kings, City and State of New York.

Third: That the complainant, together with its affiliate, Spielman Chevrolet Corporation, a corporation existing under and by virtue of the Laws of the State of New York, conducts its business at the following addresses:

220 Greenpoint Avenue, Borough of Brooklyn, City of New York.

379 Broadway, Borough of Brooklyn, City of New York.
Union and Montrose Avenues, Borough of Brooklyn, City of New York.
185 Canal Street, Borough of Manhattan, City of New York.
250 Hudson Street, Borough of Manhattan, City of New York.

Fourth: That Spielman Motor Sales Co. Inc., in the operation, conduct and management of its business aforesaid, employs approximately eighty employees in the divers divisions of its business enumerated above.

Fifth: That Spielman Motor Sales Co. Inc., in the establishment and conduct of its aforesaid business, has expended vast and considerable sums of money, time and effort, and has developed a good will amongst its customers and patrons of immeasurable value.

Sixth: That heretofore and on or about the 16th day of June, 1933, an Act of Congress commonly known as the [fol. 9] National Industrial Recovery Act, was enacted by it, and by the signature of the President of the United States, became the apparent law of the United States.

Seventh: That in the aforesaid Act, the declaration of a national emergency was declared to be in existence at the time of the said enactment by the following declaration:

"Title I—Industrial Recovery

Declaration of Policy

S. 1.

(10) Policy of the Act) A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate

governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Eighth: That by virtue of the said Act, it was provided for the adoption of certain Codes of Fair Competition for the various and divers industries within the United States, it being expressly provided, however, by Chapter 3a of the said National Industrial Recovery Act, that any such Code or Codes submitted for approval to the President of the United States shall not permit monopolies or monopolistic practices.

[fol. 10] Ninth: That heretofore and on or about the 3rd day of October, 1933, and purportedly pursuant to the provisions of Article I of the National Industrial Recovery Act, as approved by the President of the United States, on June 16th, 1933, a Code of Fair Competition for retail motor vehicle dealers, commonly known as the Motor Vehicle Retailing Code, was submitted to the Honorable President of the United States, under and by virtue of the provisions of the said National Industrial Recovery Act, and the said Motor Vehicle Retailing Code, as submitted, was approved by the President of the United States, pursuant to the apparent authority vested in him in Article I of the National Industrial Recovery Act. A true copy of the said Code of Fair Competition for the Motor Vehicle Retailing Trade is annexed hereto, as "Complainant's Exhibit A."

Tenth: That Article IV, Paragraph A, provides as follows:

"Article IV—Trade Regulations

The provisions of this section will cover the following products: passenger cars, trucks and commercial vehicles with bodies of ¾ ton capacity and less, or such other capacity limitation as may be deemed proper by the administrator.

A. Used Car Allowance

In an effort to prevent sales below cost, heretofore due to unfair competition that has resulted in the dissipation of the large part of the capital originally in this trade and has accumulated large losses since 1926, this trade agrees to regulate itself so as to return profit possibilities and support increased wages and shortened hours.

Giving consideration to the public interest and to prevent sales below cost, it is hereby provided:

(1) That the value of any model of used motor vehicle, either passenger or commercial, shall be the average price that the public in any given market area is then paying for [fol. 11] such vehicle as ascertained by the Association from sworn statements of all actual retail sales to consumers, subject to the approval of the Administrator. The Association shall publish the average prices thus ascertained approximately every 60 days. In order to insure fair average value in the interest of the consumer, published averages shall be computed for the preceding period and there shall not be included in computed for the preceding period and there shall not be included in computing such average that 20% of sales which represented the lowest sales of all actual sales reported in the previous period.

(2) That no dealer shall, directly or indirectly, or by subterfuge, accept in trade any used vehicle at an allowance price of more than its value as ascertained in paragraph (1) above, less a minimum selling, handling, and reconditioning charge, according to the following schedule:

(a) Five percent of the allowance price as determined in paragraph (1) above, on (x) the current series model, or (y) the preceding series model:

(b) Ten percent of the allowance price as determined in paragraph (1) above on the model preceding, the two models described in paragraph (2) sub-section (a) above, namely (x) and (y)..

(c) Fifteen percent of the allowance price as determined in paragraph (1) above, on all models other than the three models described in sub-sections (a) and (b) above.

(3) To provide a record for the establishment of used car allowances in paragraph (1) above, there shall be provided in each logical trading area of the United States an

Official Guide, which shall be provided by the Association which shall be known as the Association Official Guide and shall be recognized as the authority for such allowances, and which shall be based upon actual sales in each trading area for the period of approximately sixty days preceding the date on which the compilation of the official guide is started, as hereinabove provided.

(4) There shall be used as a basis of establishing allowance values, as provided in paragraph (1) and (2), above, [fol. 12] the principle of averaging actual sales at retail to consumer for the preceding period. Since this will, in isolated distances, by reason of very few or no sales on particular models, leave a need to establish a guide figure on such models, the following method of determining the allowance values will be pursued for the public protection, namely,

(a) If any model of motor vehicle described in the Official Guide shows five or more sales at retail to consumer within the district in any period, then the average figure published becomes the maximum allowance for the ensuing period.

(b) If any model of motor vehicle has less than five sales at retail to consumer within the district for the period then the new car dealers handling this particular make car within this district shall establish its allowance value, the same to be so published in the report. These figures to be subject to approval of the Advisory State Committee and the Administrator.

(c) If any make or model or motor vehicle is not represented in the district or is no longer manufactured and less than five sales at retail to consumer are reported on each or any model of such car, then the Advisory State Committee, subject to the approval of the Administrator, will set the figure based on what like models of other makes sell for in the district.

(5) No retailer shall use advertising, whether printed, radio, display or of any other nature, which is inaccurate in any material particular or misrepresents merchandise (including its use, trademark, grade, quality, quantity, size, origin, material, content, or preparation or credit terms, values, policies, or services; and no retailer shall use advertising and/or selling methods which tend to deceive or mislead the customer.

(b) No retailer shall use advertising which refers inaccurately in any material particular to any competitior or his merchandise, prices, values, credit terms, policies or services.

Fair trade practice rules for other products of this Code will be covered in the supplemental Code of Fair Trade Practices to be submitted."

[fol. 13] Eleventh. That heretofore and on or about the 26th day of August, 1933, the legislature of the State of New York, enacted a law entitled: Laws of 1933, Chapter 781, which was duly signed by the Governer of the State of New York, and became effective as apparent law on August 26th, 1933. That annexed hereto and made part hereof is a true copy of the said Laws of 1933, Chapter 781, marked Exhibit "B".

Twelfth. That heretofore and on or about the 5th day of December, 1933, purportedly pursuant to the provisions of the said Chapter 781 of the Laws of 1933, a certified copy of the Code of Fair Competition for the Motor Vehicle Retailing Trade (Complainant's Exhibit A), was filed in the Office of the Secretary of the State of New York, and in the Office of the Department of State thereof, by reason whereof the said Code allegedly became and purportedly is now the said Code of Fair Competition for the Motor Vehicle Retailing Trade for the State of New York.

Thirteenth. That purportedly pursuant to the authority vested by Article IV of the said Code of Fair Competition for the Motor Vehicle Retailing Trade, an Official Guide known as the "Association Official Guide" book was compiled and composed by National Automobile Dealers Association, a trade association incorporated under the Laws of Illinois, with its principal office at #1010 Pine Street, St. Louis, Missouri, which said Official Guide Book purportedly creates and establishes alleged "average" prices for used motor vehicles, which said "average" prices represent the alleged maximum allowance permitted to be paid to prospective purchasers on their used motor vehicles, on their trade-in, to a dealer on the purchase of a new automo-
[fol. 14] bile pursuant to Article IV, Subdivision A, Paragraph 1.

Fourteenth. That pursuant to the provisions of Chapter 781 of the Laws of 1933, it is a violation of the said Motor Vehicle Retailing Code and the said Chapter 781 of the Laws of 1933, for any retail motor vehicle dealer to offer or give a prospective customer a trade-in of a used car on the purchase of a new motor vehicle, a price for his said used motor vehicle, in excess of that allegedly fixed in the said Official Guide Book, and by virtue of the said Chapter 781 of the Laws of 1933, said violation constitutes a misdemeanor, punishable by a fine not exceeding Five Hundred Dollars.

Fifteenth. That Article IV, Subdivision B, paragraph 2, provides as follows:

"(2) No dealer or representative shall offer or give any discount, gratuity, commission, service or accessory, to a customer or his agent, for the purpose of inducing the customer or his agent, to purchase a car. Nothing herein shall prevent conduct pursuant to any warranty of the manufacturer."

Sixteenth. That any violation of the said Article IV, Subdivision B, Paragraph 2, is a misdemeanor within the provisions of Chapter 781 of the Laws of 1933, punishable by a fine not exceeding $500.00.

Seventeenth. That the defendant, William C. Dodge, is the duly elected District Attorney for the County of New York, State of New York, and holding such office under and by virtue of the several laws of the State of New York pertaining thereto.

[fol. 15] Eighteenth. That under and by virtue of the several Laws of the State of New York, it is the duty of the said defendant, as such District Attorney for the said County of New York, to prosecute in an official capacity, and when required by the public service or when otherwise directed by the Attorney General of the State of New York, to prosecute all violation of law and public offenses, and to conduct such prosecutions for such violations of law in the name of the People of the State of New York.

Nineteenth. That prior to the 3rd day of October, 1933, the complainant herein did offer to the public, its customers and patrons, actual, fair and honest values for used

automobiles that were offered to it by prospective customers on the purchase of new automobiles.

Twentieth. That the complainant herein, in accordance with the policies of the Act of Congress expressed in the National Industrial Recovery Act, has duly cooperated in the rehabilitation of industry, and has duly complied with all provisions of the Code of Fair Competition, and more particularly, has paid its employees more than the minimum wages prescribed by the said Code, and has worked its employees not more than the maximum hours provided for by the said Code. That in furtherance of the declaration of the policy by the Congress, it has employed additional employees and has otherwise striven to effectuate the policies of the Congress, except as hereinafter alleged.

Twenty-first. That by allowing customers and patrons of the complainant, actual, fair and honest values for used car trade-ins on the purchase of new automobiles, such prices being higher or lower than the "average", purportedly fixed in the said Official Guide, complainant, after [fol. 16] duly complying with all other provisions of the Motor Vehicle Retailing Code, makes a fair return and profit on its investment.

Twenty-second. That but for the adoption and approval of the Code by the President of the United States, in violation of the intent and purposes of the Congress, and but for the establishment, fixation and issuance of the aforesaid prices in the said Official Guide Book, and their apparent sanction of law, purportedly pursuant to the said Chapter 781 of the Laws of 1933 of the State of New York, but for the fact that the said Chapter 781 of the Laws of 1933 of the State of New York, by its terms inflicts a heavy penalty upon any person, firm or corporation violating the same, but for the fear that the complainant has that the severe penalties thereof will be visited upon it as hereinafter alleged, this complainant would continue to conduct, operate and manage its business in accordance with the rights, liberties and privileges granted to it under the Constitution of the United States and of the State of New York, and the several amendments thereto.

Twenty-third. That heretofore and on or about the 7th day of July, 1934, the defendant openly, publicly and other-

wise proclaimed to this complainant that he was prepared and was through his office as District Attorney of the County of New York, State of New York, ready to commence and institute a criminal prosecution against the complainant herein for alleged violation of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, acting under and pursuant to the purported [fol. 17] authority of Chapter 781 of the Laws of 1933 of the State of New York, and that the said defendant is preparing and is about to commence criminal prosecution against the complainant and others similarly situated, for alleged violations of the Code of Fair Competition of the Motor Vehicle Retailing Trade, more particularly for violation of Article IV, Subdivision A, Paragraph 1, and Article IV, Subdivision B, Paragraph 2.

Twenty-fourth. That heretofore and on or about the 7th day of July, 1934, an application was made by the defendant and his several assistants to a Magistrate of the City of New York, County of New York, in the name of the People of the State of New York, for the issuance by the said Magistrate, of a summons, directing and requiring the complainant herein to appear before the said City Magistrate, or any City Magistrate holding Court at the City Magistrate's Court, at 301 Mott Street, in the Borough of Manhattan, City, County and State of New York, on the 9th day of July, 1934, at ten o'clock A. M., to the end that investigation be made of an alleged complaint against the complainant herein, for alleged and purported violation of the provisions of the Motor Vehicle Retailing Code, and that upon such investigation, an information be drawn against the complainant herein for alleged violation, charging it with the violation of the aforesaid provisions of the Motor Vehicle Retailing Code.

Twenty-fifth. That the said defendant herein is purportedly acting under and by virtue of the authority purportedly vested in him by the aforesaid Chapter 781 of the Laws of 1933 of the State of New York.

[fol. 18] Twenty-sixth. That the defendant as District Attorney of the County of New York, State of New York, will, unless restrained from so doing by an order of this Honorable Court, institute criminal proceedings in a Court of competent jurisdiction, to enforce the provisions of the

Code of Fair Competition for the Motor Vehicle Retailing Code and the Official Guide, against the complainant herein, for its purported violation of the said Code and Official Guide, and in the event that complainant refuses to comply with the said pretended law, and in the event of conviction for such purported violation, complainant will be subject to the heavy penalties prescribed to be inflicted upon it by virtue of the said Chapter 781 of the Laws of 1933, which said penalties, if complainant be compelled to pay, will be a deprivation of its rights, liberties, properties and immunities, without due process of law, as herein alleged.

Twenty-seventh. That in the event that complainant is compelled to abide by the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly by the prices fixed in the Official Guide Book, having apparent sanction of law pursuant to Chapter 781 of the Laws of 1933, and is compelled to charge the arbitrary, unreasonable, harsh, oppressive and inequitable prices purportedly fixed, promulgated, established and issued, complainant cannot continue in its aforesaid lawful business, in which event it will be deprived of its rights, liberty, property, privileges and immunities, without due process of law.

Twenty-eighth. That unless the relief prayed for herein- [fol. 19] after is granted unto the complainant, temporarily and permanently, it will suffer irreparable damage, the exact amount thereof being now and will be incalculable of exact determination.

Twenty-ninth. That the Code of Fair Competition for the Motor Vehicle Retailing Trade, Complainant's "Exhibit A", more particularly Article IV, Subdivision A, Paragraph 1, and Article IV, Subdivision B, Paragraph 2, hereinabove alleged, and the Official Guide, purportedly issued pursuant thereto, having the apparent sanction of law by virtue of Chapter 781 of the Laws of 1933, of the State of New York, are unconstitutional, null and void, being repugnant to the Fourteenth Amendment to the Constitution of the United States, the Constitution of the State of New York, and are illegal, null and void, being in direct violation of the intents and purposes of the Congress in the enactment of the National Industrial Recovery Act, more

particularly being repugnant and violative of Chapter I and Chapter 3a of the National Industrial Recovery Act.

Thirtieth. That the National Industrial Recovery Act and the Code of Fair Competition for the Motor Vehicle Retailing Trade are unconstitutional, null and void, being violative of the Constitution of the United States, and more particularly the Fifth Amendment thereof.

Thirty-first. That this suit is authorized by law to be brought by the complainant, to redress the deprivation of its rights, privileges, property and immunities secured to it [fol. 20] by the Constitution of the United States, more particularly the Fourteenth Amendment thereof, and the Constitution of the State of New York, and this suit is further authorized to be brought by this complainant, by virtue of the unconstitutionality of Chapter 781 of the Laws of 1933, the Code of Fair Competition of the Motor Vehicle Retailing Trade, Article IV, Subdivision A, Paragraph 1, and Article IV, Subdivision B, Paragraph 2 thereof, and the Official Guide, and by virtue of the acts of the defendant herein, proceeding herein under their apparent sanction of law.

Thirty-second. That complainant has no adequate remedy at law and can only have relief in a Court of equity.

Wherefore, complain-t prays that a decree of this Court be made herein, adjudging as follows:

1. That complainant's Exhibit "A", the Code of Fair Competition for the Motor Vehicle Retailing Trade, is null, void and invalid, having been adopted and approved by the President of the United States in violation of the National Industrial Recovery Act, more particularly Chapter 1 and Chapter 3a thereof.

2. That more particularly Article IV of complainant's Exhibit "A" of the said Official Guide Book as provided in said Article IV, is invalid, null, void and unconstitutional, being repugnant to the Fourteenth Amendment of the Constitution of the United States and that the same deprives Complainant of its rights, liberty and property without due process of law.

3. That Chapter 781 of the Laws of 1933 of the State of New York, is invalid, null, void and unconstitutional, by

reason of the illegal manner of enactment, as providing for excessive punishment, as an improper delegation of legislative function in violation of the Constitution of the State of New York, and repugnant to the Fourteenth Amendment of the Constitution of the United States in that it deprives the complainant of its rights and property without due process of law.

[fol. 21] 4. That Chapter 781 of the Laws of 1933 of the State of New York, the Code of Fair Competition for Motor Vehicle Retailing Trade and the Official Guide Book issued pursuant thereto, are invalid, null, void and unconstitutional in that they deprive the complainant of its rights, liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

5. That the National Industrial Recovery Act, the Code of Fair Competition for the Motor Vehicle Retailing Trade and the Official Guide Book are invalid, null, void and unconstitutional in that the National Industrial Recovery Act was enacted by the Congress in excess of the power granted to it by the Constitution of the United States, as providing for excessive punishment, as an improper delegation of legislative power by the Congress to the President, and as depriving the complainant of its rights, liberty and property, in derogation and violation of the Fifth Amendment to the Constitution of the United States.

6. That the defendant, William C. Dodge, as District Attorney for the County of New York, State of New York, his successors, assistants, deputies, agents and employees be temporarily and permanently enjoined from in any way or manner enforcing against the complainant any of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly the provisions of Article IV thereof, and any order, rule or regulation that may be issued thereunder or that has been issued thereunder or any of the price regulations fixed and promulgated in the Official Guide Book as provided by Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade or any part or parts thereof, and from instituting or causing to be instituted any suit at law or in equity, prosecution or proceeding or otherwise as the case may be against the complainant herein for any alleged violation of

any of the provisions of the said Code of Fair Competition for the Motor Vehicle Retailing Trade under Chapter 781 of the Laws of 1933 of the State of New York.

7. That a temporary restraining order be granted before the hearing and determination of any application made for an injunction pendente lite, because of the facts as herein alleged, irreparable loss and damage will result to the complainant unless such temporary restraining order be granted.

8. That the complainant have such other, further and different relief as may be just and equitable, as well as a decree for costs.

9. That a Writ of Subpœna of the United States of [fol. 22] America, issue out of and under the seal of this Honorable Court, directed to the defendant herein named and under a certain penalty to be and appear before this Court, then and there to answer under oath all and singular the premises and allegations of this Bill of Complaint and to stand and abide by such order, direction and decree as the Court may make in the premises.

Miller, Paul & Placer, Attorneys and Solicitors for Complainant, Office & P. O. Address, No. 276 Fifth Avenue, Borough of Manhattan, City of New York.

[fol. 23] *Duly sworn to by David Spielman. Jurat omitted in printing.*

[fol. 24] EXHIBIT "A" TO BILL OF COMPLAINT

Approved Code No. 46—Reprint. Registry No. 1403—32

National Recovery Administration

Code of Fair Competition for the Motor Vehicle Retailing Trade as Approved on October 3, 1933, by President Roosevelt

Includes Amendment No. 1

[fol. 25] This publication is for sale by the Superintendent of Documents, Government Printing Office, Washington,

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[fol. 26] Approved Code No. 46

Code of Fair Competition for the Motor Vehicle Retailing Trade as Approved on October 3, 1933 by President Roosevelt

Executive Order

An application having been duly made, pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933,

for my approval of a Code of Fair Competition for the Motor Vehicle Retailing Trade, and hearings having been held thereon and the Administrator having rendered his report containing an analysis of the said Code of Fair Competition together with his recommendations and findings with respect thereto, and the Administrator having found that the said Code of Fair Competition complies in all respects with the pertinent provisions of Title I of said Act and that the requirements of clauses (1) and (2) of subsection (a) of Section 3 of the said Act have been met:

Now, therefore, I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise do adopt and approve the report, recommendations, and findings of the Administrator and do order that the said Code of Fair Competition be and it is hereby approved.

Franklin D. Roosevelt.

Approval recommended: Hugh S. Johnson, Administrator.

The White House, October 3, 1933.

[fol. 27] September 20, 1933.

The President, The White House.

My Dear Mr. President:

I have the honor to submit and recommend for your appproval the Code of Fair Competition for the Motor Vehicle Retailing Trade. The Code has been approved by the Industrial Advisory Board, the Labor Advisory Board, and the Consumers' Advisory Board.

An analysis of the provisions of the Code has been made by the Administration and a complete report is being transmitted to you.

I find that the Code complies with the requirements of clauses 1 and 2, subsection (a) of section 3 of the National Industrial Recovery Act.

I am, my dear Mr. President,

Very sincerely yours, Hugh S. Johnson, Administrator.

[fol. 28] Code of Fair Competition for the Motor Vehicle Retailing Trade

Article I—Purpose

This Code is adopted for the purpose of increasing employment, establishing fair and adequate wages, affecting necessary reduction of hours, improving standards of labor, and eliminating unfair trade practices to the end of rehabilitating the Motor Vehicle Retail Trade and enabling it to do its part toward establishing that balance of trades which is necessary to the restoration and maintenance of the highest practical degree of public welfare. It is the declared purpose of the Motor Vehicle Retail Trade to bring, insofar as may be practicable, the rates of wages paid within the Motor Vehicle Retail Trade to such levels as are necessary for the creation and maintenance of the highest practicable standard of living; to restore the income of enterprises within the trade to levels which will make possible the payment of such wages and avoid further depletion and destruction of capital assets; and from time to time to revise the rates of wages in such manner as will currently reflect the equitable adjustment to variations in the cost of living.

Article II—Definitions

Wherever in this Code, or in any proceeding under or in connection with this Code, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows:

The word "Dealer" includes, but without limitation, any individual, partnership, association, trust, or corporation engaged in whole or in part in the business of motor vehicle retailing.

The term "Exclusive or Independent Used-Car Dealer" shall mean a dealer selling used motor vehicles, who may likewise service or repair such used motor vehicles, and who does not hold an authorized new-car dealer's franchise.

The term "Motor Vehicle Retailing" shall mean the business of retailing new or used motor vehicles, and the servicing or repairing of new or used motor vehicles by persons engaged in retailing new or used motor vehicles.

The term "Motor Vehicles" as used herein means automobiles, including passenger cars, trucks, truck tractors, busses, taxicabs, hearses, ambulances, and other commer-
[fol. 29] cial vehicles, for use on the highway and excluding motorcycles, fire apparatus, and tractors other than truck tractors.

The term "Association" as used herein means National Automobile Dealers Association, a trade association incorporated under the laws of Illinois, having its principal office at No. 1010 Pine Street, St. Louis, Mo.

The term "President" shall mean the President of the United States.

The term "Administrator" shall mean the Administrator appointed under Title I of the National Industrial Recovery Act.

The term "Act" shall mean the National Industrial Recovery Act of 1933.

The term "Code" shall mean the Code of Fair Practice of the Motor Vehicle Retail Trade.

The term "Member of the Code" shall mean and include any member of the Motor Vehicle Retailing Trade who shall signify assent to this Code.

Article III—Employment Regulations

A. Labor

(1) Employees of the Motor Vehicle Retailing Trade shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;

(2) No employee of the Motor Vehicle Retailing Trade and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and

(3) Employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

B. Wages and Hours

(1) No person under 16 years of age shall be employed in the Motor Vehicle Retailing trade, provided, however, that where a State law provides a higher minimum age, no person below the age specified by such State law shall be employed within that State.

(2) No employee (except outside commission salesmen and watchmen) shall be employed for more than 44 hours in any 1 week. These maximum hours refer to the availability of the emloyee in the shop or premises of the employer at the latter's request, whether or not the employee is actively engaged in specific tasks throughout these hours. All places of business shall be kept open not less than 52 hours a week, unless such hours were less than 52 hours per week before July 1, 1933, and in which case such hours shall not be reduced at all.

[fol. 30] (3) The maximum hours fixed in the foregoing paragraph (2) shall not apply to salaried employees in a managerial, executive, or supervisory capacity who receive $30 per week or more.

(4) Not to pay any employees, except as hereinbelow provided, less than $15 per week in any city of over 500,000 population, or in the immediate trade area of such city, nor less than $14.50 per week in any city of between 250,000 and 500,000 population, or in the immediate trade area of such city; nor less than $14 per week in any city of between 2,500 and 250,000 population, or in the immediate trade area of such city; nor less than $13 per week in towns of 2,500 or less, except that one washer or greaser or porter or helper or aged or physically handicapped worker may be employed at less than $13 per week in such establishment; and except that in establishments employing more than 19 employees the number of such employees who are paid less than $13 per week may equal but not exceed 10 percent of the total number of employees in any such establishment; and provided further that no employee shall be paid less than $13 per week who was not receiving less than this wage on August 1, 1933; and provided further that the wages of any employee receiving less than $13 per week shall be increased by at least 20 percent, despite his shortened hours, provided, however, that no employer is required to raise the wages of any such employee above $13 per week.

(5) Full-time outside salesmen, who are unrestricted as to hours and receive remuneration on a commission basis, shall be guaranteed a drawing account of not less than $17.50 a week in any city of over 500,000 population, or in the immediate trade area of such city; nor less than $15 per week in any city between 250,000 and 500,000 population, or in the immediate trade area of such city; nor less than $12.50 per week in any city between 2,500 and 250,000 population, or in the immediate trade area of such city; and in towns of less than 2,500 population all salesmen shall be guaranteed not less than $10 per week.

An apprentice salesman is excepted from this guaranty until he has served at least 3 months—2 months of which must be served with employer last employing him. Such apprentices shall be limited to 1 for each 10 regular salesmen, or fraction thereof.

Population and trade area for the purpose of this article shall be determined by reference to the 1930 Federal census; except that the Emergency National Committee with the approval of the Administrator shall have the power to alter trade areas.

(6) No mechanic employed in this trade shall be paid less than 50 cents per hour unless the hourly rate for the same class of work on July 15, 1929, was less than 50 cents per hour, in which latter case such mechanic shall be paid not less than the hourly rate of July 15, 1929, and in no event less than 40 cents per hour. The weekly minimum wages established in paragraph (4) above shall also apply to mechanics covered by this paragraph (6).

(7) Paragraph (4) and paragraph (6) establish guaranteed minimum wages regardless of whether the employee is compensated on the basis of a time rate or a flat rate performance or otherwise.

(8) No dealer shall reduce the compensation for employment now in excess of the minimum wages hereby provided (notwithstanding that the hours worked in such employment may be hereby reduced) and each dealer shall increase [fol. 31] the pay for such employment by an equitable readjustment of all pay schedules.

(9) No dealer shall use any subterfuge to frustrate the spirit and intent of this Code, which is, among other things,

to increase employment, to remove obstructions to commerce, and to shorten hours and to raise minimum wages for the shorter week to a living basis.

(10) No dealer shall increase the price of any merchandise sold after the date hereof over the price on July 1, 1933, by more than is made necessary by actual increases in wages, or invoice costs of merchadise, or by taxes, since July 1, 1933, and in setting such price increases each dealer shall give full weight to probable increases in sales volume and to refrain from taking profiteering advantage of the consuming public.

(11) The maximum hours herein above provided mark the total number of hours which may be worked by any employee; whether he works for one or more employers; provided, however, that if any employee works more than such aggregate maximum without the knowledge or connivance of any one of his employers, such employer shall not be deemed to have violated this paragraph.

(12) No employee shall be classified in any of the excepted classes hereinabove unless such employee performs duties identical with those performed by employees thus classified on June 16, 1933.

Article IV—Trade Regulations

The provisions of this section will cover the following products: passenger cars, trucks and commercial vehicles with bodies of ¾ ton capacity and less, or such other capacity limitation as may be deemed proper by the administrator.

A. Used Car Allowance

In an effort to prevent sales below cost, heretofore due to unfair competition that has resulted in the dissipation of the large part of the capital originally in this trade and has accumulated large losses since 1926, this trade agrees to regulate itself so as to return profit possibilities and support increased wages and shortened hours.

Giving consideration to the public interest and to prevent sales below cost, it is hereby provided:

(1) That the value of any model of used motor vehicle, either passenger or commercial, shall be the average price

that the public in any given market area is then paying for such vehicle as ascertained by the Association from sworn statements of all actual retail sales to consumers, subject to the approval of the Administrator. The Association shall publish the average prices thus ascertained approximately every 60 days. In order to insure fair average value in the interest of the consumer, published averages shall be computed for the preceding period and there shall not be included in computing such average that 20% of sales which represented the lowest sales of all actual sales reported in the previous period.

(2) That no dealer shall, directly or indirectly, or by subterfuge, accept in trade any used vehicle at an allowance price of more than its value as ascertained in paragraph (1) above, less a minimum selling, handling, and recondi- [fol. 32] tioning charge, according to the following schedule:

(a) Five percent of the allowance price as determined in paragraph (1) above, on (x) the current series model, or (y) the preceding series model:

(b) Ten percent of the allowance price as determined in paragraph (1) above on the model preceding, the two models described in paragraph (2) sub-section (a) above, namely (x) and (y).

(c) Fifteen percent of the allowance price as determined in paragraph (1) above, on all models other than the three models described in sub-sections (a) and (b) above.

(3) To provide a record for the establishment of used car allowances in paragraph (1) above, there shall be provided in each logical trading area of the United States an Official Guide, which shall be provided by the Association which shall be known as the Association Official Guide and shall be recognized as the authority for such allowances, and which shall be based upon actual sales in each trading area for the period of approximately sixty days preceding the date on which the compilation of the official guide is started, as hereinabove provided.

(4) There shall be used as a basis of establishing allowance values as provided in paragraphs (1) and (2), above, the principle of averaging actual sales at retail to consumer for the preceding period. Since this will, in isolated instances, by reason of very few or no sales on par-

ticular models, leave a need to establish a guide figure on such models, the following method of determining the allowance values will be pursued for the public protection, namely,

(a) If any model of motor vehicle described in the Official Guide shows five or more sales at retail to consumer within the district in any period, then the average figure published becomes the maximum allowance for the ensuing period.

(b) If any model of motor vehicle has less than five sales at retail to consumer within the district for the period then the new car dealers handling this particular make car within this district shall establish its allowance value, the same to be so published in the report. These figures to be subject to approval of the Advisory State Committee and the Administrator.

(c) If any make or model or motor vehicle is not represented in the district or is no longer manufactured and less than five sales at retail to consumer are reported on each or any model of such car, then the Advisory State Committee, subject to the approval of the Administrator, will set the figure based on what like models of other makes sell for in the district.

(5) No retailer shall use advertising, whether printed, radio, display or of any other nature, which is inaccurate in any material particular or misrepresents merchandise (including its use, trademark, grade, quality, quantity, size, origin, material, content, or preparation or credit terms, values, policies, or services; and no retailer shall use advertising and/or selling methods which tend to deceive or mislead the customer.

(b) No retailer shall use advertising which refers inaccurately in any material particular to any competitor or his merchandise, prices, values, credit terms, policies or services.

[fol. 33] Fair trade practice rules for other products of this Code will be covered in the Supplemental Code of Fair Trade Practices to be submitted.

B. Marketing Rules

The following Marketing Rules shall take effect 30 days after the approval by the President:

(1) No dealer shall sell a new car at retail to a customer for less than factory list prices, plus an amount equal to—

(a) Equipment at listed prices.

(b) All taxes paid by dealer applicable to the motor vehicle sold.

(c) Average cost of transportation from factory of said dealer or shipments received by said dealer during a 60-day period as shown by sworn statement of said dealer.

(d) Dealer's actual cost of handling (including such items as (w) unloading, (x) assembling, (y) conditioning for delivery, and (z) interest actually paid by said dealer, but not to exceed 90 days on cost of transportation).

The only exceptions to these prices shall be sales to proprietors' immediate families or members of his organization when for the personal use of such buyer. Motor vehicles sold to employees for use in their employer's business as demonstrators or executives' cars, and cars used as demonstrators by dealer, must be so registered with their trade association, or with the State Advisory Committee; demonstrators' and executive cars shall not be sold to a consumer at retail for less than the full retail price except when they have been in use for a period of at least 60 days from the date of registration, as aforesaid, and have had at least 3,500 miles actual road usage, or when the manufacturers has made public announcement of a change in model.

(2) No dealer or representative shall offer or give any discount, gratuity, commission, service, or accessory, to a customer or his agent, for the purpose of inducing the customer or his agent to purchase a car. Nothing herein shall prevent conduct pursuant to any warranty of the manufacturer.

(3) Charges for financing retail conditional sales shall be upon an equitable basis to consumer and dealer. No dealer in financing conditional retail sales shall charge a lower rate than the lowest or a higher rate than the highest rate charged by regularly established finance companies operating in the same district at the dealer.

(4) With the approval of the State Advisory Committee and the manufacturer concerned, a dealer will be permitted to sell and offer for sale, new cars that have been discon-

tinued or are about to be discontinued at less than delivered prices as described in the first paragraph of this section. The intent of this provision is to enable dealers to dispose of their own or their factories' stock. In the event that approval is refused, or that no action is taken within 10 days by the said Committee or the manufacturer, said dealer shall have right of appeal to the Administrator, whose decision shall be final.

(5) With the approval of the State Advisory Committee and the manufacturer concerned, the dealer may sell or offer for sale, any open type of new car at less than delivered price, as described in the first paragraph of this [fol. 34] section, provided the dealer will present a sworn statement showing that such car has been included in said dealer's inventory for a period of not less than 45 days. The intent of this provision is to enable a dealer to dispose of a type of car which is or may shortly become difficult to sell because of a change in seasons. In the event that approval is refused or that no action is taken within 10 days by the said committee or the manufacturer, said dealer shall have right of appeal to the Administrator, whose decision shall be final.

(6) It shall be an unfair trade practice for any new car dealer or representative to sell or permit to be sold any new motor vehicle for resale in a territory already enfranchised for that make of motor vehicle except through a regularly enfranchised dealer in that territory and it shall also be an unfair trade practice for any dealer to purchase a vehicle as above prohibited.

(7) The retail list price for parts, accessories, and supplies will be the manufacturers' published list price adjusted to include all taxes. It shall be an unfair trade practice for any dealer to sell such parts, accessories, and supplies at other than retail list price, except to duly authorized dealers, associate or sub-dealers, or established service stations, operating under any NRA Code.

(8) A dealer shall on delivery of a new car from the manufacturer, inspect and ascertain that the speedometer on the new car is connected before using the car for any purpose. A dealer shall not disconnect the speedometer or permit it to be disconnected. The purpose of this pro-

vision is to insure the customer having full knowledge of the mileage traveled by the motor vehicle which is offered for retail sale.

C. Trade Practice Rules

The Emergency National Committee shall hold a trade practice conference as often as may be necessary for the purpose of making recommendations to the Administrator in regard to the establishment and amending of rules of fair trade practice for the Trade.

Article V—Districts of the Industry

A. For the purpose of the administration of this Code, there shall be in each State an advisory committee consisting of not less than five, one of whom shall be elected from the exclusive or independent used car dealers, elected by the dealers of such State, in convention or by mail vote. The chairman of each State Advisory Committee shall be a member of the Emergency National Committee. The Vice Chairman of each State Advisory Committee shall be an alterate member of the Emergency National Committee.

Each such State Advisory Committee shall constitute the fair practice and planning agency to cooperate with the Administrator in respect to problems relating exclusively to the said State. Proposals in respect to matters affecting more than one State may be initiated by any State Advisory Committee and shall be submitted for consideration to the Emergency National Committee of the motor vehicle retailing trade hereinafter described and its determination, subject to the approval of the Administrator, shall be binding upon said State and all other States affected thereby. [fol. 35] For the purpose of the administration of this Code, the District of Columbia, Metropolitan New York, and the rest of New York, Metropolitan Chicago, and the rest of Illinois, shall be considered one State.

States may be divided or rearranged upon application of any association or group of associations subject to the approval of the Emergency National Committee hereinafter described.

B. Executive Committees

Each of the present component associations making up each State Group and any others which may subsequently

be formed within the Motor Vehicle Retailing trade shall set up Executive Committees for the purpose of assisting in administration of the provisions of the Code, to secure adherence thereto, to hear and adjust complaints, to consider proposals for amendments thereof and exceptions thereto, and otherwise to carry out within the component associations by cooperation through the State Advisory Committee the purposes of the National Industrial Recovery Act as set forth in this Code. Any decision of the Committee shall be subject to final appeal to the Administrator. No inequitable restrictions upon membership in any such association shall at any time be imposed.

Article VI—Emergency National Committee

A. Representation

There shall be an Emergency National Committee of the Motor Vehicle Retailing Trade composed of the Chairman of each State Advisory Committee and five additional members, who shall be members of some State Advisory Committee, elected at large by the exclusive or independent used car dealers.

"Provided, however, that if any State Advisory Committee shall not have been duly constituted, or any Chairman of any State Advisory Committee shall not have been duly selected on April 30, 1934, or if any of the aforesaid five additional members shall not have been duly selected on such date, such of the Chairmen of the State Advisory Committees and of the five additional members as have been duly selected on said date, shall constitute an Acting Emergency National Committee, pending due selection of the remaining chairmen of State Advisory Committees and additional members. Such Acting Emergency National Committee shall be in power to exercise the powers and shall be subject to the duties herein set forth for the Emergency National Committee."

B. Powers

The Emergency National Committee shall be the general planning and coordinating agency for the industry. Its members selected as aforesaid shall be empowered to act

for their respective State Advisory Committees conclusively in respect to all matters before the National Committee for consideration and within its jurisdiction. The Chairman of the Emergency National Committee shall appoint fourteen members, three of whom shall be exclusive used car dealers to be called the Administrative Committee. Such appointments are to be approved by a majority of the members of the Emergency National Committee, and to insure balaneed representation of all classes of dealers must [fol. 36] include dealers from smaller towns, and dealers geographically representative of the Nation, as well as the various lines of cars and with consideration of the appointee's availability and willingness to serve.

The Emergency National Committee shall delegate its power to the smaller body to be exercised as necessary to problems requiring attention between meetings of the National body.

The Emergency National Committee shall have powers and duties as provided herein, and in addition thereto it shall,

(1) From time to time require such reports from state associations and component association, or from local associations, or from individual dealers, as in its judgment, subject to the approval of the Administrator, may be necessary to advise it adequately of the administration and enforcement of the provisions of this code:

(2) Upon complaint of interested parties or upon its own initiative make such inquiry and investigation into the operation of the Code as may be necessary, and report its findings to the Administrator, and

(3) Make rules and regulations necessary for financing the administration and enforcement of this Code, subject to the approval of the Administrator. The Committee may delegate any of its authority to the National Control Committee hereinafter provided and may designate such agents as it shall determine.

Article VII—Statistics

The National Automobile Dealers Association will serve as a medium through which all required statistics will be obtained, and each member of the Code shall upon request furnish it with a sworn statement of such information and

make his books available to the National Automobile Dealers Association, to the end that the terms of this Code regarding increase of wages, shortening of hours, and the establishment of fair used-car allowance, based upon all actual sales and the maintenance of established prices, may constantly be available to the Administrator.

Article VIII—National Control Committee

The Emergency National Committee of the motor vehicle retailing trade shall appoint from its own membership a National Control Committee of 4 members, 1 of whom shall be an exclusive used-car dealer. In addition, there may be two non-voting members appointed by the Administrator. The National Control Committee shall exercise such authority as may be delegated to it by the said Emergency National Committee. All communications and conferences of the motor vehicle retailing trade with the President or with his agents concerning the approval or amendment of this Code or of any of its provisions or any matters relating thereto, shall be through the said National Control Committee The National Control Committee shall serve as an executive agency for the Emergency National Committee of the motor vehicle retailing trade and shall be charged with the execution of the duties, through agents or otherwise, of hearing and adjusting complaints, considering proposals for amendments and making recommendations thereon, approving recommendations, for exceptions to the provisions of this Code, and otherwise administering its provisions. Any member of this Trade shall have the right [fol. 37] of appeal to the Emergency National Committee from decisions of the National Control Committee and the decisions of the said Emergency National Committee may be appealed from, to the Administrator whose decision will be final. The function of this committee shall be the general planning and coordinating for the motor vehicle retail trade and the cooperation with similar boards of the National Automobile Chamber of Commerce and other branches of the industry to the end of effecting a balanced national economy.

Article IX—General

(1) No provision in this Code shall be interpreted or applied in such manner as to:

(a) Promote monopolies
(b) Permit or encourage unfair competition
(c) Eliminate or oppress enterprises, or
(d) Discriminate against small enterprises.

(2) This Code is hereby expressly made subject to the right of the President, pursuant to Section 10 (b) of the National Industrial Recovery Act, from time to time, to cancel or modify any order, approval, license, rule, or regulation issued under Title I of said Act, and particularly, but without limitations, to cancel or modify his approval of this Code or any condition imposed by him upon such approval.

(3) The Emergency National Committee of the motor vehicle retailing trade and the National Control Committee shall from time to time make to the Administrator such recommendations, including amendments of the Code, as in their judgment will aid the effective administration of this Code, or may be necessary to effectuate within the motor vehicle retailing trade or within any subdivision thereof for which the purpose of the Act is administered.

(4) Such of the provisions of this Code as are not required to be included therein by the Act, may, with the approval of the President, be modified or eliminated as changes in circumstances or experience may indicate. It is contemplated that from time to time supplementary provisions to this Code or Codes, including in particular, but without limitations, supplementary provisions relating to dealers engaged exclusively in servicing or repairing, will be submitted for the approval of the President to prevent urfair competition in price and other unfair and destructive competitive practices and to effectuate the other purposes and policies of Title I of the Act consistent with the provisions thereof.

(5) Violation by any dealer of the motor vehicle retailing trade or any provisions of this Code, or of any approved rule issued thereunder, is an unfair method of competition.

(6) If any employer in this industry is also an employer in any other industry, the provisions of this Code shall apply to and affect only that part of the business of such employer which is a part of the trade covered by this Code.

(7) This Code shall become effective upon its approval by the President, except as herein specifically provided.

Approved Code No. 46.
Registry No. 1403-32.

[fol. 38] EXHIBIT "B" TO BILL OF COMPLAINT

Laws of 1933, Chapter 781

(Effective—August 26, 1933)

Purpose

An Act to provide for codes of fair competition for trades, industries and subdivisions thereof. Agreements, licenses, rules and regulations pursuant to the provisions of the National Industrial Recovery Act, enacted by the congress of the United States effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative finding; statement of policy.—A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the state of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the state of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred and thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this

state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York.

[fol. 39] S. 2. Filing of Codes and Agreements.—1. The Secretary of State is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each code, agreement, license, rule or regulation in effect pursuant to such act of the congress, pertaining, affecting or in any way relating to the conduct of business in the state and duly certified as a true copy of such document or documents by the officials in charge of the administration of the provisions of title one of the said national industrial recovery act or by their duly authorized agents. Upon such filing of a copy so certified of a code of fair competition for any trade, industry or subdivision thereof, as approved by the President of the United States, or of any agreement or license or of any rule or regulation provided for under title one of the said National Industrial Recovery Act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, and any violation of any provision of such code, agreement, license, rule or regulation shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense, and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.

2. The Secretary of State shall cause to be printed a sufficient number of copies of each such code, agreement, license, rule or regulation and the same shall be kept available for distribution upon request therefor.

3. If in any such code, agreement, license, rule or regula-

tion, power is conferred upon any person or group of persons to subpœna witnesses, compel the production of books, papers and records, the attendance of witnesses or to take their testimony, a like power shall be deemed to have vested in such person or group of persons with regard to matters and things of a wholly intrastate character.

S. 3. Jurisdiction of Court.—The Supreme Court of the State of New York is hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition, agreement, license, rule or regulation, filed pursuant to this act, and to prevent and restrain the commission within this state of any act tending to defeat or hamper the operation and effectiveness, within the state, of such act of the congress at the instance of any party whose interests are or may be adversely affected by such violations or acts. Nothing in this section contained, however, shall in any wise affect the criminal liability for violations of such codes, agreements, licenses, rules or regulations. Provided, however, that nothing in this act shall be con- [fol. 40] strued by any public official or court as declaring illegal the right of workers to organize; to adopt a constitution and by-laws and enforce the same and the right to control and direct the members of such organization in accordance with such constitution and by-laws; that no provisions of this action shall be construed with such constitution and by-laws; that no provision of this Act shall be construed to compel workers or employees to continue at their work; or to declare an act illegal of an organization to collectively cease work; or its officers directing the cessation of work of its members.

S. 4. Products of Individual Labor.—Nothing in this act shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this act prevent anyone from marketing or trading the produce of his farm.

S. 5. Exemption from Anti-Trust Laws; Application of Labor Laws.—While this act is in effect and for sixty days thereafter, any code, agreement, license, rule or regulation in effect under this act, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of article twenty-two of the general business law, or of any other provisions of law, to the

extent that such provisions of law are inconsistent with the provisions of such code, agreement, license, rule or regulation. Nothing in this act contained, however, shall be construed in any way to alter, modify or affect the provisions of existing laws of this state in such manner as to permit any change in public utility rates except with the permission and approval of the public service commission or as to lower the standards therein provided with regard to labor, hours of labor, wages for labor and employment of females and children.

S. 6. Effect of the Issuance, Suspension or Revocation of Licenses.—1. The license required of and obtained by any person pursuant to paragraph (b) of section four of said act of the congress shall be deemed to include business engaged in or carried on by him of a wholly intrastate character, and with respect thereto such person shall be subject to all the terms and conditions expressed therein and shall be entitled to all the privileges and immunities granted thereby.

2. The failure to obtain such a license or the suspension or revocation by the President of the United States of any such license shall preclude such person from engaging in or carrying on any business of a wholly intrastate character.

[fol. 41] 3. Any person who engages in or carries on any business in this state in violation of subdivision two of this section shall, upon conviction thereof, be fined not more than five hundred dollars and for each day such violation continues a separate offense, subject to the fine herein prescribed shall be deemed to have been committed.

Sec. 7. Letting of Public Contracts.—Every department, board, bureau, agency, authority, commission, public body or officer of the state or of any political subdivision thereof or district therein charged with the duty of letting or awarding contracts for (a) the construction, alteration, or repair of public works or (b) the purchasing of materials or supplies, shall, notwithstanding any inconsistent provision of law, let or award such contracts only to such persons or corporations, otherwise qualified, who or which will agree in and by the terms of such contract to use or supply only articles, materials and supplies which have been or will be mined, produced, manufactured or supplied, as the

case may be, by a person or corporation who or which is a party or subject to a code of fair competition, agreement or license, approved, prescribed or issued under the said national industrial recovery act for the trade, industry or subdivision thereof mining, producing, manufacturing or supplying such articles, materials or supplies.

S. 8. Duration.—This act, in so far as it affects agreement, codes, rules or regulations, shall become ineffective contemporaneously with the expiration of said national industrial recovery act, provided for by section two (c) of said act, and in so far as it affects licenses, contemporaneously with the expiration of the said National Industrial Recovery Act, as provided for in section four (b) of said act.

S. 9. Effect of Partial Invalidity.—If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of this act, and the application of the provisions thereof to other persons or circumstances, shall not be affected thereby.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DAVID SPIELMAN

STATE OF NEW YORK,
County of New York, ss:

David Spielman, being duly sworn, deposes and says:

I am the President of the Spielman Motor Sales Co. Inc., the complainant herein, and also president of the Spielman Chevrolet Corporation, an associate company.

Both Spielman Motor Sales Co. Inc. and its affiliate, Spielman Chevrolet Corporation, have been duly incorporated under and by virtue of the Laws of the State of New York.

Ever since the year 1933, the Spielman Motor Sales Co. Inc., has been engaged in the business and trade of buying and selling motor vehicles, motor vehicle parts and accessories, and the general service and repair of motor vehicles. The character of the business of the complainant

brings it within the definition of the term "dealer", as defined in Article II of the Code of Fair Competition for [fol. 43] the Motor Vehicle Retailing Trade.

The Spielman Motor Sales Co. Inc., is a duly authorized retail agency of the Chevrolet Motor Company, selling Chevrolet motor cars, popularly characterized as "low priced" cars.

The Spielman Motor Sales Co. Inc. and its affiliate, conduct places of business, at the following addresses:

220 Greenpoint Avenue, Borough of Brooklyn, City of New York.

379 Broadway, Borough of Brooklyn, City of New York.

Union and Montrose Avenues, Borough of Brooklyn, City of New York.

185 Canal Street, Borough of Manhattan, City of New York.

250 Hudson Street, Borough of Manhattan, City of New York.

The complainant and its affiliated company is the largest Chevrolet agency in the entire metropolitan area of New York City, and conducting, as it does, all of its business within the territorial confines of the State of New York, has ascended to prestige, being one of the largest automobile dealers in the East. It employs in excess of eighty persons, and in the year 1933, its annual gross sales exceeded One Million Dollars. Large sums of money have been invested and expended in both physical assets and in the establishment and retention of the intangible good will of such organizations. These vast expenditures have developed a patronage amongst its customers of immeasurable monetary value.

[fol. 44] The President of the United States on June 16th, 1933, signed the National Industrial Recovery Act, and in pursuance thereof, on October 3rd, 1933, he did approve the Code of Fair Competition for the Motor Vehicle Retailing Trade.

The prime object of both this enactment and of the Code, was to reemploy more people at a fair wage.

Spielman Motor Sales Co. Inc. and its affiliate, have enthusiastically cooperated in attaining the sought for objective. Both its weekly payroll and the number of employees increased more than 50%, without any substantial increase in sales. As a matter of fact, complainant and its

affiliate company, have always paid wages far greater than that paid by the average motor vehicle retail dealer in this area.

The complainant has very assiduously adhered to every phase of the said Code of Fair Competition with respect to its labor provisions, and despite the aggressive efforts, as will hereafter be described in full, the Local Administrator of the aforementioned Code of Fair Competition, has been unable to charge the complainant with any deviation from such regulations.

Complainant and its officers wholeheartedly endorse the benefits that are clearly derived from such salutary labor provisions of the Code, and have unqualifiedly adhered to such provisions.

[fol. 45] This application is presently made to determine the validity, as laws of the State of New York, of certain "fair trade practice provisions" of the said Code of Fair Competition.

The enforcement of such "fair trade practice provisions" has occasioned great loss to the complainant, and if such provisions are to be enforced, will occasion further additional loss, as to effectually force the complainant out of business.

Basically, such grievous provisions are "price fixing" instrumentalities. Permit me to discuss this problem in greater detail.

Sales of new automobiles are consummated basically in two different ways.

The first is the outright sale of a new automobile, for a fixed price. This price is paid either in cash or amortized by payments over a period of time.

The second is what is known as a "trade in" sale. A price is established for the car to be sold, and the consideration for such car is made up in part by the delivery of the purchaser's old car. The balance of the consideration is paid in cash, either outright or amortized over a period of time.

The first contemplates an outright sale. The second contemplates part barter and part sale.

[fol. 46] The experience in recent years of the complainant and its affiliate company, which I believe to be typical of the rest of the industry, demonstrates that approximately 85% of the automobiles sold, is through the second method above described, known as a "trade in" sale.

The Code of Fair Competition for the Motor Vehicle Retailing Trade, under Article IV, Subsection A, establishes the method through which maximum prices are fixed for used car allowances in the purchase of new automobiles.

While theoretically, this establishes but a maximum price that a dealer may allow for any particular model of automobile, for all practical purposes, such maximum has become the price for all automobiles of the said model.

Inasmuch as more than 85% of all transactions contemplate a "trade in", the fixing of an arbitrary price for such "trade in", serves to effectually fix the basis of the transaction, and consequently the price for the new car purchased.

The grievance of the complainant lies basically in the inequality and inequities arising out of such arbitrary price regulation.

[fol. 47] Code Provisions Relative to Price Fixing and Their Operation

Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, reads as follows:

Article IV—Trade Regulations

The provisions of this section will cover the following products: passenger cars, trucks and commercial vehicles with bodies of ¾ ton capacity and less, or such other capacity limitation as may be deemed proper by the administrator.

A. Used Car Allowance

In an effort to prevent sales below cost, heretofore due to unfair competition that has resulted in the dissipation of the large part of the capital originally in this trade and has accumulated large losses since 1926, this trade agrees to regulate itself so as to return profit possibilities and support increased wages and shortened hours.

Giving consideration to the public interest and to prevent sales below cost, it is hereby provided:

(1) That the value of any model of used motor vehicle, either passenger or commercial, shall be the average price that the public in any given market area is then paying for

such vehicle as ascertained by the Association from sworn statements of all actual retail sales to consumers, subject to the approval of the Administrator. The Association shall publish the average prices thus ascertained approximately every 60 days. In order to insure fair average value in the interest of the consumer, published averages shall be computed for the preceding period and there shall not be included in computing such average that 20% of sales which represented the lowest sales of all actual sales reported in the previous period.

(2) That no dealer shall, directly or indirectly, or by subterfuge, accept in trade any used vehicle at an allowance price of more than its value as ascertained in paragraph (1) above, less a minimum selling, handling, and reconditioning charge, according to the following schedule:
[fol. 48] (a) Five per cent of the allowance price as determined in paragraph (1) above, on (x) the current series model, or (y) the preceding series model.

(b) Ten percent of the allowance price as determined in paragraph (1) above on the model preceding, the two models described in paragraph (2) sub-section (a) above, namely (x) and (y).

(c) Fifteen percent of the allowance price as determined in paragraph (1) above, on all models other than the three models described in sub-sections (a) and (b) above.

(3) To provide a record for the establishment of used car allowances in paragraph (1) above, there shall be provided in each logical trading area of the United States an Official Guide, which shall be provided by the Association which shall be known as the Association Official Guide and shall be recognized as the authority for such allowances, and which shall be based upon actual sales in each trading area for the period of approximately sixty days preceding the date on which the compilation of the official guide is started, as hereinabove provided.

(4) There shall be used as a basis of establishing allowance values, as provided in paragraphs (1) and (2), above, the principle of averaging actual sales at retail to consumer for the preceding period. Since this will, in isolated instances, by reason of very few or no sales on particular models, leave a need to establish a guide figure on such

models, the following method of determining the allowance values will be pursued for the public protection, namely:

(a) If any model of motor vehicle described in the Official Guide shows five or more sales at retail to consumer within the district in any period, then the average figure published becomes the maximum allowance for the ensuing period.

(b) If any model of motor vehicle has less than five sales at retail to consumer within the district for the period then the new car dealers handling this particular make car within this district shall establish its allowance value, the same to be so published in the report. These figures to be subject to approval of the Advisory State Committee and the Administrator.

(c) If any make or model of motor vehicle is not represented in the district or is no longer manufactured and less than five sales at retail to consumer are reported on each or any model of such car, then the Advisory State Committee, subject to the approval of the Administrator, will set the figure based on what like models of other makes sell for in the district.

[fol. 49] (5) No retailer shall use advertising, whether printed, radio, display, or any other nature, which is inaccurate in any material particular or misrepresents merchandise (including its use, trade mark, grade, quality, quantity, size, origin, material, content, or preparation or credit terms, values, policies, or services; and no retailer shall use advertising and/or selling methods which tend to deceive or mislead the customer.

(6) No retailer shall use advertising which refers inaccurately in any material particular to any competitor or his merchandise, prices, values, credit terms, policies, or services.

Fair trade practice rules for other products of this Code will be covered in the Supplemental Code of Fair Trade Practices to be submitted.

B. Marketing Rules

The following Marketing Rules shall take effect 30 days after the approval by the President:

(1) No dealer shall sell a new car at retail to a consumer for less than factory list prices, plus an amount equal to—

(a) Equipment at listed prices.

(b) All taxes paid by dealer applicable to the motor vehicle sold.

(c) Average cost of transportation from factory of said dealer or shipments received by said dealer during a 60-day period as shown by sworn statement of said dealer.

(d) Dealer's actual cost of handling (including such items as (w) unloading, (x) assembling, (y) conditioning for delivery, and (z) interest actually paid by said dealer, but not to exceed 90 days on cost of transportation).

The only exceptions to these prices shall be sales to proprietors' immediate families or members of his organization when for the personal use of such buyer. Motor vehicles sold to employees for use in their employer's business as demonstrators or executives' cars, and cars used as demonstrators by dealer, must be so registered with their trade association, or with the State Advisory Committee; demonstrators' and executive cars shall not be sold to a consumer at retail for less than the full retail price except when they have been in use for a period of at least 60 days from the date of registration, as aforesaid, and [fol. 50] have had at least 3,500 miles actual road usage, or when the manufacturer has made public announcement of a change in model.

(2) No dealer or representative shall offer or give any discount, gratuity, commission, service, or accessory, to a customer or his agent, for the purpose of inducing the customer or his agent to purchase a car. Nothing herein shall prevent conduct pursuant to any warranty of the manufacturer.

(3) Charges for financing retail conditional sales shall be upon an equitable basis to consumer and dealer. No dealer in financing conditional retail sales shall charge a lower rate than the lowest or a higher rate than the highest rate charged by regularly established finance companies operating in the same district as the dealer.

(4) With the approval of the State Advisory Committee and the manufacturer concerned, a dealer will be permitted to sell and offer for sale, new cars that have been discontinued or are about to be discontinued at less than delivered

prices as described in the first paragraph of this section. The intent of this provision is to enable dealers to dispose of their own or their factories' stock. In the event that approval is refused, or that no action is taken within 10 days by the said Committee or the manufacturer, said dealer shall have right of appeal to the Administrator, whose decision shall be final.

(5) With the approval of the State Advisory Committee and the manufacturer concerned, the dealer may sell or offer for sale, any open type of new car at less than delivered price, as described in the first paragraph of this section, provided the dealer will present a sworn statement showing that such car has been included in said dealer's inventory for a period of not less than 45 days. The intent of this provision is to enable a dealer to dispose of a type of car which is or may shortly become difficult to sell because of a change in seasons. In the event that approval is refused or that no action is taken within 10 days by the said committee or the manufacturer, said dealer shall have right of appeal to the Administrator, whose decision shall be final.

[fol. 51] (6) It shall be an unfair trade practice for any new car dealer or representative to sell or permit to be sold any new motor vehicle for resale in a territory already enfranchised for that make of motor vehicle except through a regularly enfranchised dealer in that territory and it shall also be an unfair trade practice for any dealer to purchase a vehicle as above prohibited.

(7) The retail list price for parts, accessories, and supplies will be the manufacturers' published list price adjusted to include all taxes. It shall be an unfair trade practice for any dealer to sell such parts, accessories, and supplies at other than retail list price, except to duly authorized dealers, associate or sub-dealers, or established service stations, operating under any NRA Code.

(8) A dealer shall on delivery of a new car from the manufacturer, inspect and ascertain that the speedometer on the new car is connected before using the car for any purpose. A dealer shall not disconnect the speedometer or permit it to be disconnected. The purpose of this provision is to insure the customer having full knowledge of the mileage

traveled by the motor vehicle which is offered for retail sale.

C. Trade Practice Rules

The Emergency National Committee shall hold a trade practice conference as often as may be necessary for the purpose of making recommendations to the Administrator in regard to the establishment and amending of rules of fair trade practice for the Trade."

Pursuant to this provision, the National Automobile Dealers Association, was empowered to collate all of the used car sales through reports, and to establish an average used car price after having eliminated the margin of 20% of lowest priced automobiles. This average then became the maximum price at which any dealer could accept a similar model of automobile for trade in purposes.

[fol. 52] This very provision, without an examination of the provisions in actual operation, discloses the fallacy of its calculations.

If the average so established, is truly an average, it must contemplate automobiles of value greater than the average and lower than the average, in order to establish such an average. To then take this average and to establish it as the maximum trade in allowance, is to deny to the prospective purchaser of an automobile, who has a used car to trade in that would normally be in the upper brackets in establishing the average, the true value of his automobile.

In other words, since the average of used car sales in the preceding sixty day period becomes the maximum permitted as a trade in allowance, a definite price is fixed on all cars of a particular model, of greater value than the average, but through the ingenuity of this method of calculation, the prospective purchaser is denied the true value of his automobile, but is arbitrarily forced to accept the average established by the sale of a number of automobiles. The converse, however, is not true. Theoretically at least, the prospective purchaser who has an automobile worth less than the average receives a price higher than the actual worth of his automobile, by reason of the fact that the maximum as fixed, has in reality become a minimum, and dealers quote the maximum for the value of a car less than the average, at a decided loss to the dealer.

[fol. 53] In other words, this provision foists upon the purchasing public, a very unfair burden. A prospective purchaser, whose car was worth less than the average, received the higher value for his car. The prospective purchaser whose car was worth more than the average, received but the average, or a price substantially less than the true value of his trade in.

Just as unsound and unreasonable as is this method of price fixing in theory, so too did it work in actual practice.

First and foremost, while the Code of Fair Competition called for the establishment of an average based upon actual used car sales, those in charge of the National Automobile Dealers Association, the official reporting agency, sought to fix the arbitrary prices that the officials of such Association had in mind, irrespective of the reported sales. Without foundation in reason or cause, the National Automobile Dealers' Association returned used car sales reports, duly authenticated, to dealers throughout the nation, and advised them that such reports would not at all be considered in establishing an average.

On November 29th, 1933, the complainant herein received from the said National Automobile Dealers Association, twenty four used car sales reports, with a mimeographed form letter that read as follows:

[fol. 54] National Automobile Dealers Association

1010 Pine St., St. Louis, Mo.

Nov. 27, 1933.

Spielman Motor Sales Co., Brooklyn, N. Y.

Dear Sir:

We are returning September Sales Report received from you. We are rejecting this sale from our compilation for the reason that the net sales price reported is obviously inflated and incorrect, or represents a "junk" sale and to include it in our report would distort average sales prices.

May we urge upon you the absolute importance of supplying accurate sales figures.

Yours very truly, National Automobile Dealers Ass'n, Statistical Department. NEB.—EM.

It is quite obvious from the examination of this letter, that many general reasons had been assigned, ranging from

inflated and incorrect prices, to the other extreme of junk sales.

It is to be noted that the form of this letter makes reference to "junk" sales as a reason for rejecting such used car sales reports. As a matter of fact, such "junk" sales [fol. 55] were to be reported because the method of calculation specifically provided for the elimination of the marginal 20% of used car sales, upon the theory that such sales might in fact reflect "junk" sales.

It is to be particularly noted that no assertion of truth, with respect to the statements made in the letter, have any support in facts, whatsoever.

Such reports did not meet with the whim and fancy of the officers of this Association and were therefore rejected.

We can come to but one conclusion and that is that the officers of this Association definitely established what values were to be fixed and then used such reports as would be necessary to arrive at such conclusion. All other reports were necessarily rejected.

The officers of the National Automobile Dealers Association were eager to make large and handsome profits for their constituents, the result of which was the fixation in most instances, of low and insufficient "maximum prices" for used car allowances. Unquestionably, they must have determined that such low maximums would afford their member dealers an opportunity to resell such trade-in cars at a substantial profit.

This avarice and greed is more responsible for the entire collapse of code adherence and enforcement than any other factor.

[fol. 56] The experience of my organization and its affiliate, is typical of every other dealer that sought to comply with the provisions of the Code. Customers of long standing sought to complete transactions, but found that the maximum price fixed was so far under the true value of the car sought to be traded in, that such a patron either abandoned the thought of making a purchase, or sought out some dealer that was not as scrupulous, and who was willing to pay a true value for such a trade in.

I have personally contacted many men engaged in business, with a reputation over a period of a generation, of being good, substantial and law abiding citizens, walk out of our establishment with the expression, they regretted

that they could not do business with Spielman Motor Sales Co. Inc., but that they were compelled to ferret out some dealer who was not as meticulous about Code adherence, as the complainant.

Annexed hereto and made part of this application, are a series of affidavits of reputable dealers of motor cars in metropolitan New York, whose experiences parallel that of the complainant. It is significant to note, however, that the dealers whose affidavits are annexed, are not exclusively Chevrolet dealers, but are dealers of other makes of automobiles, other than Chevrolet.

[fol. 57] The irony of the situation is impressive. Honest men seeking out law violators, so that they might in fact, receive an honest and true value for their property. Think of it, honest business men, urging other men and institutions, to flaunt the law, so that a transaction involving the honest exchange of value might be truly consummated.

By actual tabulation, the complainant has actually lost between 170 and 180 sales of automobiles, which were later consummated by other dealers at prices prohibited by code regulation, the loss to the complainant in dollar volume being well in excess of $100,000.00 in sales.

This experience was not novel. The very administrator of the State Advisory Committee of the Motor Vehicle Retailing Code, Mr. John B. Hulett, told me in a person to person conversation, that his records indicated over 1200 complaints on violations in the metropolitan area of New York. It is reasonable to assume that not all trades that were consummated contrary to the code, were reported, and that in fact, perhaps ten times that number would more truly reflect the actual conditions.

In view of the fact that there are less than one thousand dealers in this metropolitan area, it is conservative to say that violation of the code is predominant and adherence rare.

[fol. 58] Such a wholesale flaunting of the laws by both seller and purchaser alike, is not typical usually of the citizenry of this nation. There is something basically unsound, something basically inequitable in the rules that are sought to be enforced, that has resulted in such a complete collapse of this price structure. The answer is simple. The first law of nature is self preservation. Every purchaser seeks a reasonable and true value for his property. When he finds

that one dealer will not afford him such, he finds another, irrespective of code provisions.

Perhaps foolishly, in face of wide-spread violation, complainant has rigidly adhered to the provisions of the Code, though I, representing the complainant, have from the very inception of the Code, at every trade meeting and in the forms of letters that will be adduced on the argument of this application, vehemently protested the unfairness of such code provisions, strenuously asserting the fundamental difficulty of its enforcement—because it was basically unsound, because it did not truly afford the patron a true and honest value for his property.

Such honest expression of opinion earned for the complainant, the unmitigated wrath of the local enforcing agency, the Motor Vehicle Retailing Code Administration of Metropolitan New York Inc. Every conceivable method that the administrator himself could contrive, was employed. First persuasion, then threats, then boycott, then entrappment, and finally, attempted criminal prosecution. [fol. 59] Methods in one extreme, of employing the planting of dictaphones in private homes for the purpose of aiding entrappment, to the other extreme of sending emissaries promising abandonment of criminal prosecutions, in return for an admission of non-compliance, have been utilized.

Almost every sale of a new automobile of the complainant, was pursued by Mr. Hulett, who terms himself as the Local Administrator of this Code. Customers were sent questionnaires to be filled in by them, with respect to their purchase of new automobiles from the complainant. Threats and intimidation were employed against such customers, who refused to answer the questionnaires or submit affidavits of their purchases.

I will submit to this Court in due time, affidavits of such customers, showing the methods employed to harass and annoy the complainant herein, by reason of the stand taken by it to safeguard its business and its constitutional rights. Such methods as have been employed by the Motor Vehicle Retailing Code Administration of Metropolitan New York, Inc., are repulsive and repugnant to both man and governmental agency alike, and in a democratic government, should be looked upon with a disdain of the despised.

Violations of the provisions of Article IV of the Code of

Fair Competition for the Motor Vehicle Retailing Code, are rampant and wholesale, is well known in the trade, as is attested by the annexed affidavits of several of the dealers [fol. 60] and by the admissions of the administrator himself, for sales are either consummated in either wilful disregard of the provisions of the said Article IV, or by numerous and divers subterfuges.

Not only has there been an actual fixation of price for a trade in used car, but by the provisions of Article IV, Subdivision B, Paragraph (2) of the said Code, no dealer or representative of a dealer is permitted to allow any discount, commission or other inducement to a customer or his agent, for the purpose of inducing the purchase of a new automobile. This is but another method of establishing and maintaining fixed prices in the sale of cars. Such provision has become an added hindrance to the complainant, in the consummation of sales of new automobiles.

Prior to the adoption of the Code, it was the common and adopted practice of all automobile dealers, and recognized by manufacturers, to allow to large fleet owners, a special discount of 10% on the purchase of a fleet of automobiles. As a matter of fact, in addition to the usual 10% discount given by dealers, the manufacturer would give an overriding discount based upon the volume of business obtained from the particular fleet owner. This practice is apparently now restrained and prohibited by the Code, causing the complainant the further loss of sales to fleet owners, who are reluctant to purchase entire fleets, without any advantage to them by reason of such wholesale purchase.

[fol. 61] The experience of complainant shows that the large fleet owners retain their used motor vehicles wherever possible and recondition them for further use, instead of purchasing a new fleet, for there is no added inducement to fleet owners to trade all their used cars and purchase new fleets, without the former 10% discount. In fact, some fleet owners are limiting their purchases to bare necessities. Where a used car cannot possibly be reconditioned or repaired, and is beyond such repair, then and then only are they turning towards the purchase of new cars.

In one particular instance, the complainant herein contracted for the sale of twelve sedan Chevrolet automobiles, six for immediate delivery and six for future delivery. This contract was entered into prior to the adoption of the Code. The six cars for immedite delivery were de-

livered to the customer, but the administrator refused to permit the complainant herein to deliver the remaining six cars after the adoption of the Code, by reason of the fact that the contract although entered into prior to the adoption of the Code, called for the usual 10% discount to the fleet owner.

In still another transaction, wherein five business coupes were involved, the order therefor was taken prior to the adoption of the Code, for immediate delivery. However, the models were produced after the Code. Still again, the administrator refused to permit the complainant to allow the usual 10% discount, although as in this instance, the [fol. 62] contract was entered into prior to the adoption of the Code.

To set forth at length and in detail, each and every obstacle that has been cast in the way of complainant while doing a legitimate business, by reason of the provisions of Article IV of the Code, would be to unduly burden the Court and unduly lengthen this affidavit.

The past experience of the complainant herein under this Code, compels the complainant to commence this action, for the further compulsion of compliance with these price fixing provisions of Article IV, will cause the complainant herein considerable and inestimable loss in in further sales, as to seriously threaten complainant's further continuance in business.

I respectfully submit that the ascertained prices upon the so-called average basis, as set forth in the Official Guide Book, compiled by the National Automobile Dealers Association, a membership corporation of the State of Illinois, and having the apparent sanction of law, are unfair, unreasonable, arbitrary, oppressive and inequitable, and if the complainant corporation herein is further compelled to adhered to the provisions of Article IV and the prices fixed and established in the Official Guide Book, it cannot continue in its lawful business and will thereby be deprives of its rights and property, without due process of law.

[fol. 63] The aid of a Court of equity is necessary, so that the constitutional rights of the complainant shall not be impaired. That its rights to continue in its lawful business should not be hindered by such laws and provisions as hereinabove enumerated.

That in the event that complainant refuses to abide by the provisions of Article IV of the Code of Fair Compe-

tition for the Motor Vehicle Retailing Trade, it is subject to the severe penalties to be inflicted upon it by virtue of the provisions of Chapter 781 of the Laws of 1933, at the rate of $500.00 per day for each continued violation.

If the complainant continues to comply with the provisions of Article IV of the said Code, it is being deprived of an inestimable amount of sales, as has been experienced since the adoption of the Code, or in the alternative, the infliction of severe penalties upon it, in the event of violation thereof.

In either even, it is and will be deprived of its property and lawful business, without due process of law, and as I have been advised, in derogation of complainant's inalienable rights accured to it by the respective Constitutions of the United States of America, the State of New York, and the several amendments thereto.

The defendant herein is the duly elected District Attor- [fol: 64] ney of the County of New York, who, by virtue of the several laws of the State of New York, more particularly Chapter 781 of the Laws of 1933, is required and compelled to prosecute all violations of law and public offenses, and to conduct such prosecutions for such violations of law in the name of the People of the State of New York.

That by virtue of the filing of a certified copy of the Code of Fair Competition for the Motor Vehicle Retailing Trade, on the 5th day of December, 1933, in the office of the Secretary of State of the State of New York, the said Code of Fair Competition for the Motor Vehicle Retailing Trade, has the apparent sanction of law of the State of New York, and it is likewise encumbent upon the defendant, in his official capacity as such District Attorney, to prosecute any violations of any of the provisions of the said Code of Fair Competition for the Motor Vehicle Retailing Trade.

On the 3rd day of July, 1934, at the special instance and request of the Motor Vehicle Retailing Code Administration Metropolitan New York, Inc., upon the suggestion and instigation of the State Advisory Committee of the Motor Vehicle Retailing Code, an enforcement unit of the provisions of the said Motor Vehicle Retailing Code, one Harold H. Straus, was specially deputized by the defendant herein, as a special assistant district attorney for the County of New York, and was sworn in as such special

assistant district attorney by Otto H. Rosalsky, a Judge [fol. 65] of General Sessions of the State of New York, for the County of New York, and by virtue thereof, invested in accordance with the laws of the State of New York, with the right, power and duty to prosecute in the name of the People of the State of New York, any violations of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

That thereafter and on or about the 7th day of July, 1934, the defendant together with the said Harold H. Straus, special assistant district attorney, announced to the complainant and other motor vehicle dealers, publicly and otherwise, that they were prepared and through the office of the defendant, as District Attorney of the County of New York, State of New York, ready to commence and institute a criminal prosecution against the complainant herein for an alleged violation of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly, an alleged violation of the provisions of Article IV of the said Code of Fair Competition, the said defendant and the said Harold H. Straus, acting purportedly under and pursuant to the purported authority of Chapter 781 of the Laws of 1933, of the State of New York.

That in furtherance of the said public and open threat of the defendant and the said Harold H. Straus, on or about the 7th day of July, 1934, an application was made by the defendant and the said Harold H. Straus, as such deputized [fol. 66] assistant district attorney, to one, James G. McDonald, Chief City Magistrate of the City of New York, County of New York, in the name of the People of the State of New York, for the issuance by the said Magistrate, of a summons, directing, compelling and requiring the said complainant herein and two others, to appear before the said City Magistrate, or any City Magistrate holding Court at the City Magistrate's Court at #301 Mott Street, in the Borough of Manhattan, City, County and State of New York, on the 9th day of July, 1934, to the end that an investigation be made of an alleged complaint against the complainant herein, signed and sworn to by one Fred Gross, as complainant, for an alleged purported violation of the provisions of Article IV of the Motor Vehicle Retailing Code, and that upon such investigation, an information be drawn against the complainant herein, for such alleged

violation, and that the complainant herein stand trial upon such alleged charge.

That on the 7th day of July, 1934, a copy of the said summons was personally served upon your deponent, as President of the complainant herein, who, by virtue of the penalties provided in the Code of Criminal Procedure of the State of New York, was compelled to appear before the City Magistrate holding Court at the said City Magistrate's Court on the 9th day of July, 1934, to answer the alleged charge of a violation of the provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

[fol. 67] That the complainant herein duly appeared on the said 9th day of July, 1934, and a continuance of the said hearing and investigation of the complaint was ordered until the 13th day of July, 1934, and on the 13th day of July, 1934, the said hearing and investigation was continued until the 9th day of August, 1934, before the said City Magistrate in the said City Magistrate's Court of the City of New York.

That the defendant and his said special assistant, Harold H. Straus, are and will, unless restrained from so doing by an order of this Court, prepared to institute the said criminal proceedings to enforce the provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade against the complainant herein, for its purported violation of the said Code, and Article IV thereof, and that if the defendant herein is permitted to pursue the said institution of such criminal proceedings against the complainant, it will suffer irreparable damage, all in deprivation of its rights and property, secured to it by the Constitutions of the State of New York, the United States of America, and the several amendments thereto.

In view of all the foregoing, complainant prays this Court, for an order granting unto the complainant herein, temporarily and pendente lite, the injunctive relief prayed [fol. 68] for in the bill of complaint filed herein.

David Spielman.

Sworn to before me this 1st day of August, 1934. Adele Morse, Notary Public, Kings County. Kings Co. Cl'k No. —, Reg. No. 6180. New York Co. Cl'k No. —, Reg. No. 6M200. Queens Co. Cl'k No. 433, Reg. No. 2308. Commission Expires March 30, 1936.

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF S. FREDERICK PLACER

STATE OF NEW YORK,
County of New York, ss:

S. Frederick Placer, being duly sworn, deposes and says:

That he is a member of the law firm of Miller, Paul & Placer, the attorneys for the complainant herein, with offices at 276 Fifth Avenue, Borough of Manhattan, City of New York, and that he is duly admitted to practice before this Court.

Your deponent is fully familiar with the facts and pleadings herein.

After a review of the facts and law herein, your deponent has advised the complainant herein that it has a good, sufficient and meritorious cause of action, and entitled to the relief sought in a Court of Equity.

[fol. 70] That no previous application has been made for the relief herein prayed for, to any other Court or Judge.

The reason an order to show cause is prayed for, together with a stay, is to maintain the status quo herein by reason of the fact that the summons issued by the defendant against the complainant herein is returnable before the Magistrate's Court in the City of New York, on the 9th day of August, 1934. In order that the rights of the complainant herein may not be jeopardized by any further actions on the part of the defendant, a stay pending the hearing and determination of this application is respectfully prayed for.

Pursuant to Section 380 of the United States Code, your deponent respectfully requests the convening of a Statutory Court, as provided in the said Section 380, to hear and determine the said application, as it involves the constitutionality of a State law, towit: Chapter 781 of the laws of 1933 of the State of New York.

S. Frederick Placer.

Sworn to before me this 2nd day of August, 1934. Melvin L. Levitt, Notary Public. N. Y. Co. Cl'k No. —, Reg. No. —. My commission expires March 30, 1936. (Seal.)

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EDNA S. BURKE

STATE OF NEW YORK,
County of ——, ss:

Edna Sperl Burke, being duly sworn, deposes and says:

I am Secretary of Bushwick Decatur Motor, Inc., a Corporation, engaged in the sale at retail of automobiles and motor vehicles.

I am a duly authorized agent for the sale of Ford automobiles, and have been such for one year.

I am familiar with conditions prevalent in the retail motor vehicle trade, immediately prior to the adoption of the Motor Vehicle Retailing Code, and with the conditions that have arisen subsequent to its approval.

Prior to the adoption of the Motor Vehicle Retailing Code, the retailing of automobiles was subject to no price regulations. A customer was afforded by all dealers in general, a fair and actual value of a used car offered by the customer for trade-in purposes on the purchase of a new automobile.

[fol. 72] With the approval of the Motor Vehicle Retailing Code, including as it does Article IV, a restriction has been placed upon dealers, wherein they are restricted and compelled to pay to prospective purchasers of new automobiles, not the actual, honest and true value of the automobile offered for trade-in purposes on the purchase of a new car, but a price as defined in the said Article IV, not above the "average" price as ascertained.

With this provision, a prospective purchaser having a trade-in used car of more than average value, cannot be allowed more than the "average" price as ascertained.

This has resulted in a refusal of customers to accept the "average" price for their used car for trade-in purposes, where their used cars were better than the "average" price, dmanding the actual fair value of the used car trade-in.

I have been compelled by reason of the Code to lose such sales, for I could not pay unto the prospective customer the actual value of his used car on a trade-in, where the actual value was in fact greater than the "average" price permitted to be paid by the code.

This price regulation and restriction has therefore had a decided unwholesome effect upon my business.

1st. Customers have refused to purchase new cars, where they could not get a fair and actual value for their used car trade-in.

2nd. Where I have refused to pay more than the "Average" price for a more than the average car, I have found customers have consummated purchases of new automobiles and have secured for their used car trade-in from [fol. 73] other dealers, values higher than those set by the Code as the "average" price, in apparent violation of Article IV, Paragraph a, Subdivisions 1 and 2 of the Code.

That dealers are violating the price provisions of the Code, is well known in the trade, for by numerous and divers subterfuges, used car trade-ins are accepted, at prices higher than the "average" prices set by the Code.

Since the approval of this Code, I have lost approximately (75) seventy-five sales, due to the fact that I was restricted from paying more than the "average" price for more than the average cars. This has resulted in the loss to me of several thousands of dollars, due primarily to the price fixing features of the Code.

The further compulsion of compliance with this price fixing provision will cause me further considerable and inestimable loss in sales.

I firmly believe in the principles of the Recovery Movement and have always adhered to the wage and hour provisions of the Code, in an endeavor to aid industrial recovery. However, the price fixing features of Article IV of the Motor Vehicle Retailing Code, are destructive of the fundamental purposes of the Recovery Act, and are retarding any possible progress of the industry, in that they stifle and thwart the purchase of new automobiles when trade-in values are not permitted at actual and true values.

Violations of the Code are prevalent and I believe that the enforceability of the price fixing provisions of the Motor Vehicle Retailing Code, cannot and will not be enforced in the industry.

Edna Sperl Burke.

Sworn to before me this 23rd day of July, 1934.
David Speelman, Notary Public, Kings County.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HAROLD PERFIT

STATE OF NEW YORK,
County of Kings, ss:

Harold Perfit, being duly sworn, deposes and says:

I am President of Harper Motors, Inc., a Corporation, engaged in the sale at retail of automobiles and motor vehicles.

I am a duly authorized agent for the sale of Chevrolet automobiles, and have been such for years.

I am familiar with conditions prevalent in the retail motor vehicle trade, immediately prior to the adoption of the Motor Vehicle Retailing Code, and with the conditions that have arisen subsequent to its approval.

Prior to the adoption of the Motor Vehicle Retailing Code, the retailing of automobiles was subject to no price regulations. A customer was afforded by all dealers in general, a fair and actual value of a used car offered by the customer for trade-in purposes on the purchase of a new automobile.

With the approval of the Motor Vehicle Retailing Code, [fol. 75] including as it does Article IV, a restriction has been placed upon dealers, wherein they are restricted and compelled to pay to prospective purchasers of new automobiles, not the actual, honest and true value of the automobile offered for trade-in purposes on the purchase of a new car, but a price as defined in the said Article IV, not above the "average" price as ascertained.

With this provision, a prospective purchaser having a trade-in used car of more than average value, cannot be allowed more than the "average" price as ascertained.

This has resulted in a refusal of customers to accept the "average" price for their used car for trade-in purposes, where their used cars were better than the "average" price, demanding the actual fair value of the used car trade-in.

I have been compelled by reason of the Code to lose such sales, for I could not pay unto the prospective customer the actual value of his used car on a trade-in, where the actual value was in fact greater than the "average" price permitted to be paid by the Code.

This price regulation and restriction has therefore had a decided unwholesome effect upon my business.

1st. Customers have refused to purchase new cars, where they could not get a fair and actual value for their used car trade-in.

2nd. Where I have refused to pay more than the "average" price for a more than the average car, I have found that customers have consummated purchases of new automobiles and have secured for their used car trade-in from other dealers, values higher than those set by the Code as the "average" price, in apparent violation of Article IV, Paragraph a, Subdivisions I and 2 of the Code.

[fol. 76] That dealers are violating the price provisions of the Code, is well known in the trade, for by numerous and divers subterfuges, used car trade-ins are accepted, at prices higher than the "average" prices set by the Code.

Since the approval of this Code, I have lost approximately (75) seventy-five sales, due to the fact that I was restricted from paying more than the "average" price for more than the average cars. This has resulted in the loss to me of several thousands of dollars, due primarily to the price fixing features of the Code.

The further compulsion of compliance with this price fixing provision will cause me further considerable and inestimable loss in sales.

I firmly believe in the principles of the Recovery Movement and have always adhered to the wage and hour provisions of the Code, in an endeavor to aid industrial recovery. However, the price fixing features of Article IV of the Motor Vehicle Retailing Code, are destructive of the fundamental purposes of the Recovery Act, and are retarding any possible progress of the industry, in that they stifle and thwart the purchase of new automobiles when trade-in values are not permitted at actual and true values.

Violations of the Code are prevalent and I believe that the enforceability of the price fixing provisions of the Motor Vehicle Retailing Code, cannot and will not be enforced in the industry.

Harold Perfit.

Sworn to before me this 21st day of July, 1934.
David B. Spielman, Notary Public, Kings County.
(Seal.)

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ALEXANDER J. RUSSELL

STATE OF NEW YORK,
County of ——, ss:

Alexander J. Russell, being duly sworn, deposes and says:

I am President of A. J. Russell Motor Sales, Inc., a Corporation, engaged in the sale at retail of automobiles and motor vehicles.

I am a duly authorized agent for the sale of Dodge and Plymouth automobiles, and have been such for years.

I am familiar with conditions prevalent in the retail motor vehicle trade, immediately prior to the adoption of the Motor Vehicle Retailing Code, and with the conditions that have arisen subsequent to its approval.

Prior to the adoption of the Motor Vehicle Retailing Code, the retailing of automobiles was subject to no price regulations. A customer was afforded by all dealers in general, a fair and actual value of a used car offered by the customer for trade-in purposes on the purchase of a new automobile.

With the approval of the Motor Vehicle Retailing Code, [fol. 78] including as it does Article IV, a restriction has been placed upon dealers, wherein they are restricted and compelled to pay to prospective purchasers of new automobiles, not the actual, honest and true value of the automobile offered for trade-in purposes on the purchase of a new car, but a price as defined in the said Article IV, not above the "average" price as ascertained.

With this provision, a prospective purchaser having a trade-in used car of more than average value, cannot be allowed more than the "average" price as ascertained.

This has resulted in a refusal of customers to accept the "average" price for their used car for trade-in purposes, where their used cars were better than the "average" price, demanding the actual fair value of the used car trade-in.

I have been compelled by reason of the Code to lose such sales, for I could not pay unto the prospective customer the actual value of his used car on a trade-in, where the actual value was in fact greater than the "average" price permitted to be paid by the Code.

This price regulation and restriction has therefore had a decided unwholesome effect upon my business.

1st. Customers have refused to purchase new cars, where they could not get a fair and actual value for their used car trade-in.

2nd. Where I have refused to pay more than the "average" price for a more than the average car, I have found that customers have consummated purchases of new automobiles and have secured for their used car trade-in from other dealers, values higher than those set by the Code as the "average" price, in apparent violation of Article IV, paragraph a, Subdivisions 1 and 2 of the Code.

[fol. 79] That dealers are violating the price provisions of the Code, is well known in the trade, for by numerous and divers subterfuges, used car trade-ins are accepted, at prices higher than the "average" prices set by the Code.

Since the approval of this Code, I have lost approximately sixty (60) sales, due to the fact that I was restricted from paying more than the "average" price for more than the average cars. This has resulted in the loss to me of several thousands of dollars, due primarily to the price fixing features of the Code.

The further compulsion of compliance with this price fixing provision will cause me further considerable and inestimable loss in sales.

I firmly believe in the principles of the Recovery Movement and have always adhered to the wage and hour provisions of the Code, in an endeavor to aid industrial recovery. However, the price fixing features of Article IV of the Motor Vehicle Retailing Code, are destructive of the fundamental purposes of the Recovery Act, and are retarding any possible progress of the industry, in that they stifle and thwart the purchase of new automobiles when trade-in values are not permitted at actual and true values.

Violations of the Code are prevalent and I believe that the enforceability of the price fixing provisions of the Motor Vehicle Retailing Code, cannot and will not be enforced in the industry.

Alex J. Russell.

Sworn to before me this 21st day of July, 1934.
David B. Spielman, Notary Public, Kings County.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HENRY CAPLAN

STATE OF NEW YORK,
County of Kings, ss:

Henry Caplan, being duly sworn, deposes and says:

I am President of Henry Caplan Inc., a Corporation, engaged in the sale at retail of automobiles and motor vehicles.

I am a duly authorized agent for the sale of Chrysler and Plymouth automobiles, and have been such for 18 years.

I am familiar with conditions prevalent in the retail motor vehicle trade, immediately prior to the adoption of the Motor Vehicle Retailing Code, and with the conditions that have arisen subsequent to its approval.

Prior to the adoption of the Motor Vehicle Retailing Code, the retailing of automobiles was subject to no [fol. 81] price regulations. A customer was afforded by all dealers in general, a fair and actual value of a used car offered by the customer for trade-in purposes on the purchase of a new automobile.

With the approval of the Motor Vehicle Retailing Code, including as it does Article IV, a restriction has been placed upon dealers, wherein they are restricted and compelled to pay to prospective purchasers of new automobiles, not the actual, honest and true value of the automobile offered for trade-in purposes on the purchase of a new car, but a price as defined in the said Article IV, not above the "average" price as ascertained.

With this provision, a prospective purchaser having a trade-in used car of more than average value, cannot be allowed more than the "average" price as ascertained.

This has resulted in a refusal of customers to accept the "average" price for their used car for trade-in purposes, where their used cars were better than the "average" price, demanding the actual fair value of the used car trade-in.

I have been compelled by reason of the Code to lose such sales, for I could not pay unto the prospective customer

the actual value of his used car on a trade-in, where the actual value was in fact greater than the "average" price permitted to be paid by the Code.

[fol. 82] This price regulation and restriction has therefore had a decided unwholesome effect upon my business.

1st. Customers have refused to purchase new cars, where they could not get a fair and actual value for their used car trade-in.

2nd. Where I have refused to pay more than the "average" price for a more than the average car, I have found that customers have consummated purchases of new automobiles and have secured for their used car trade-in from other dealers, values higher than those set by the Code as the "average" price, in apparent violation of Article IV, Paragraph a, Subdivisions 1 and 2 of the Code.

That dealers are violating the price provisions of the Code, is well known in the trade, for by numerous and divers subterfuges, used car trade-ins are accepted, at prices higher than the "average" prices set by the Code.

Since the approval of this Code, I have lost approximately one hundred twenty-five (125) sales, due to the fact that I was restricted from paying more than the "average" price for more than the average cars. This has resulted in the loss to me of several thousands of dollars, due primarily to the price fixing features of the Code.

The further compulsion of compliance with this price fixing provision will cause me further considerable and inestimable loss in sales.

[fol. 83] I firmly believe in the principles of the Recovery Movement and have always adhered to the wage and hour provisions of the Code, in an endeavor to aid industrial recovery. However, the price fixing features of Article IV of the Motor Vehicle Retailing Code are destructive of the fundamental purposes of the Recovery Act, and are retarding any possible progress of the industry, in that they stifle and thwart the purchase of new automobiles when trade-in values are not permitted at actual and true values.

Violations of the Code are prevalent and I believe that the enforceability of the price fixing provisions of the Mo-

tor Vehicle Retailing Code, cannot and will not be enforced in the industry.

Henry Caplan.

Sworn to before me this 22nd day of July, 1934. David B. Spielman, Notary Public. Kings County Clerk's No. 1118. Kings County Reg. No. 5434. Commission expires March 30, 1935.

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE SHAPIRO

STATE OF NEW YORK,
County of Kings, ss:

George Shapiro, being duly sworn, deposes and says:

I am President of Atlas Garage Inc., a Corporation, engaged in the sale at retail of automobiles and motor vehicles.

I am a duly authorized agent for the sale of Oldsmobile automobiles, and have been such for six (6) years.

I am familiar with conditions prevalent in the retail motor vehicle trade, immediately prior to the adoption of the Motor Vehicle Retailing Code, and with the conditions that have arisen subsequent to its approval.

Prior to the adoption of the Motor Vehicle Retailing Code, the retailing of automobiles was subject to no price [fol. 85] regulations. A customer was afforded by all dealers in general, a fair and actual value of a used car offered by the customer for trade-in purposes on the purchase of a new automobile.

With the approval of the Motor Vehicle Retailing Code, including as it does Article IV, a restriction has been placed upon dealers, wherein they are restricted and compelled to pay to prospective purchasers of new automobiles, not the actual, honest and true value of the automobile offered for trade-in purposes on the purchase of a new car, but a price as defined in the said Article IV, not above the "average" price as ascertained.

With this provision, a prospective purchaser having a trade-in used car of more than average value, cannot be allowed more than the "average" price as ascertained.

This has resulted in a refusal of customers to accept the "average" price for their used car for trade-in purposes, where their used cars were better than the "average" price, demanding the actual fair value of the used car trade-in.

I have been compelled by reason of the Code to lose such sales, for I could not pay unto the prospective customer the actual value of his used car on a trade-in, where the actual value was in fact greater than the "average" price permitted to be paid by the Code.

[fol. 86] This price regulation and restriction has therefore had a decided unwholesome effect upon my business.

1st. Customers have refused to purchase new cars, where they could not get a fair and actual value for their used car trade-in.

2nd. Where I have refused to pay more than the "average" price for a more than the average car, I have found that customers have consummated purchases of new automobiles and have secured for their used car trade-in from other dealers, values higher than those set by the Code as the "average" price, in apparent violation of Article IV, Paragraph a, Subdivisions 1 and 2 of the Code.

That dealers are violating the price provisions of the Code, is well known in the trade, for by numerous and divers subterfuges, used car trade-ins are accepted, at prices higher than the "average" prices set by the Code.

Since the approval of this Code, I have lost approximately Twenty-Five (25) sales, due to the fact that I was restricted from paying more than the "average" price for more than the average cars. This has resulted in the loss to me of several thousands of dollars, due primarily to the price fixing features of the Code.

The further compulsion of compliance with this price fixing provision will cause me further considerable and inestimable loss in sales.

[fol. 87] I firmly believe in the principles of the Recovery Movement and have always adhered to the wage and

hour provisions of the Code, in an endeavor to aid industrial recovery. However, the price fixing features of Article IV of the Motor Vehicle Retailing Code, are destructive of the fundamental purposes of the Recovery Act, and are retarding any possible progress of the industry, in that they stifle and thwart the purchase of new automobiles when trade-in values are not permitted at actual and true values.

Violations of the Code are prevalent and I believe that the enforceability of the price fixing provisions of the motor Vehicle Retailing Code, cannot and will not be enforced in the industry.

George Shapiro.

Sworn to before me this 22nd day of July, 1934. David B. Spielman, Notary Public. Kings County Clerk's No. 1118. Kings County Reg. No. 5434. Commission expires March 30, 1935.

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING STATUTORY COURT—Filed Aug. 8, 1934

The complainant above named having moved this Court by order to show cause, dated the 3rd day of August, 1934, for an injunction pendente lite, as prayed for in the bill of complaint duly filed with the Clerk of this Court, and the said application having been made returnable on the 7th day of August, 1934, at the United States Courthouse, Post Office Building, in the Borough of Manhattan, City and State of New York, and the complainant herein by Miller, Paul & Placer, its attorneys, having duly applied for the appointment of a Statutory Court pursuant to Section 380, Article 38 of the United States Code, to hear and determine the application of the complainant herein, it is

[fol. 89] On motion of Miller, Paul & Placer, the attorneys for the complainant herein,

Ordered that the above entitled application for an injunction pendente lite, be and the same hereby is directed to be heard before a Statutory Court, pursuant to Article

38, Section 380 of the United States Code, on the 16 day of August, 1934, at Room 439, the United States Court House, Post Office Building, in the Borough of Manhattan, City and State of New York, at 11:00 A. M., in the forenoon of that day, or as soon thereafter as counsel can be heard, and it is further

Ordered that Martin T. Manton, Judge of the United States Circuit Court of Appeals, Second Circuit, Murray Hulbert, Judge of the United States District Court, Southern District of New York, and Robert P. Patterson, Judge of the United States District Court Southern District of New York, are hereby designated to constitute the said Statutory Court, to hear and determine the said application, and it is further

Ordered that a copy of this order be served upon the defendant herein, John J. Bennett, Esq., the Attorney General of the State of New York, and upon the Honorable Herbert H. Lehman, Governor of the State of New York, 5 days prior to the date set herein for the hearing of this application.

Robert P. Patterson.

[File endorsement omitted.]

[fol. 90] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN B. HULETT

CITY OF NEW YORK,
County of New York,
State of New York, ss:

John B. Hulett, being duly sworn, deposes and says:

That he resides at the Essex House, 160 Central Park South, Borough of Manhattan, City of New York.

That your deponent had been in the automobile business from 1906 to 1931.

That your deponent has been duly designated by the Metropolitan New York State Advisory Committee of the Motor Vehicle Retailing Trade as its Commissioner, which Committee was duly elected by the dealers of this district, which includes the Counties of New York, Bronx, Brooklyn, Queens, Richmond, Westchester, Nassau, Suffolk and

Rockland in the State of New York, and Hudson County, New Jersey, and approved by K. M. Simpson, National Recovery Administration Division Administrator and F. W. A. Vesper, Chairman, National Control Committee.

That your deponent is empowered by said committee in its behalf to administer the Code of Fair Competition for the Motor Vehicle Retailing Trade in said district.

That your deponent has been referred to by one David Spielman, President of the complainant in his affidavit.

That your deponent has read the Bill of Complaint and the affidavits submitted by the complainant herein to restrain the defendant, his deputies and others from enforcing, as against the complainant by way of criminal prosecution, or otherwise, any of the provisions of the said Code.

That your deponent calls this Court's attention to the fact, as stated in the said Bill of Complaint verified by the said David Spielman in the 21st Paragraph thereof, that (1) said complainant acknowledges violations of the [fol. 91] said Code; and that (2) by allowing customers and patrons "actual fair and honest values for used car trade-ins" that the complainant makes a fair return and profit on his investment.

That at this point no monetary loss has apparently been suffered by this complainant.

That his complaint is barren of any facts tending to show his version of the facts of the pending proceeding in the Commercial Frauds Court Division of the City Magistrates Court.

Deponent refers to the affidavit of Harold H. Straus, submitted with these papers, which sets forth the charge of which the said complainant complains.

That deponent avers on information and belief that the said complainant has since January 1st, 1934, opened two new branches of his business, which may account for the said Spielman's assertion that his payroll has increased more than 50%.

That deponent knows of no affirmative step on the part of the said complainant that he has enthusiastically cooperated to reemploy more people at a fair wage. As a matter of fact, a labor complaint was lodged against the Spielman Motor Sales Company in the early part of February, 1934, with our Code Authority. On refusal of said Spielman to sign a statement of the facts in the case the file was held in abeyance.

Your deponent refers to the affidavit of Jack Frost, whose affidavit is submitted with this affidavit in opposition, for facts and data showing the reasonableness of all the trade regulations provided for in the said code.

Your deponent likewise refers to the said affidavit of Jack Frost relative to the letter received by the complain-
[fol. 92] ant on November 27th from the National Automobile Dealers Association for the facts regarding the same.

It might be interesting to the Court to know that the said complainant became a member of the Brooklyn Motor Vehicle Dealers Association in 1925 and has been a member ever since. (See Ralph Ebbert's affidavit.)

Your deponent calls the Court's attention to the fact that at least upon one occasion, soon after the advent of the Code of Fair Competition for the Motor Vehicle Retailing Trade, he had a conversation with the said Spielman and tried to convince him of the great possibilities of the Code from the standpoint of the dealer and was informed by said Spielman that while he was sympathetic and felt that the Code properly enforced would be a great benefit to all dealers, he would not sign compliance with the Code until he had had further opportunity to discuss the matter with his factory officials and ascertain their attitude toward the Code with special reference to his connection with it in any way.

At this point your deponent desires to advise this Court that at no time to his knowledge has the said complainant, nor the said David Spielman assented to the Code. His statements in his affidavit to the effect that he has rigidly adhered to the provisions of the Code seem inconsistent with the fact that he failed to sign compliance with the Code.

That the National Automobile Dealers Association is the Association made responsible for the proper issuance of the said Official Used Car Guide Book, mentioned in said Spielman's affidavit, and deponent refers to the affidavit of one Ralph Ebbert, Manager of the Brooklyn Motor Vehicle Dealers Association, to the effect that the said Spielman was notified by the Association of all meetings for the discussion of the features of the Code, as well as the meet-
[fol. 93] ings for the appointment of a delegate to attend the hearings in Washington, at which meetings all the provisions of the Code were read and unanimously agreed to

by the said Brooklyn Motor Vehicle Dealers Association of which the said Spielman was a member.

Your deponent calls the Court's attention to the fact that the Bushwick Decatur Motors, Inc., one of the complainants' affiants, of which Edna Sperl Burke is Secretary, has been charged with two violations in the Magistrates Court and that these proceedings are now pending against the said Bushwick Decatur Motors, Inc.

Deponent has received no word from the said complainant, as Code Authority, of the 170 or 180 sales of automobiles, which were lost by complainant and by him allegedly lost because the sales were subsequently consummated by other dealers at prices prohibited by Code regulations. It should be the duty of the complainant if he knows of such violations of the code to report same to the Code Authority.

Deponent denies the allegation of the said Spielman that his records indicated over 1200 complaints of violations in the Metropolitan Area of New York, but deponent did talk with said Spielman and estimated that number of complaints.

Your deponent has, however, since checked the complaints made and finds that since October 3rd, 1933, there have been 964 complaints. A large percentage of these were unfounded, no violations having occurred. The dealers involved in proven cases are about 125, or about 8% of the total number of dealers in that our list of dealers, according to the record of the Secretary of State of New York, shows that there are 1559 dealers in the ten Counties under the jurisdiction of the Metropolitan New York State Advisory Committee, of which your deponent is the Commissioner.

[fol. 91] Your deponent denies that he and/or his office has at any time used "persuasion, then threats, than boycotts, then intimidation," as alleged by the said Spielman. As a matter of fact, the evidence in support of the pending proceeding under which the said Spielman is now in the Magistrates Court, was secured through the Association of which he is a member, as more specifically set forth in the affidavit of Ralph Ebbert, aforementioned.

Your deponent denies that he has sent any emissaries to the said complainant, promising abandonment of criminal prosecution in return for an admission of noncompliance.

Your deponent denies that every sale of a new automo-

bile by the complainant was pursued by your deponent or his office.

Deponent further denies that threats and intimidation were used against customers of the said Spielman who refused to answer questionnaires regarding their purchases.

Your deponent as Code Commissioner has caused questionnaires to be sent in the regular course of checking on some sales of all dealers for the protection of the public, and it may be that some of these have been received by some of said Spielman's purchasers. These questionnaires are invariably sent by mail, so that the question of intimidation could not take place. In a small percentage of cases investigators are sent out to call on these purchasers, but they are all instructed by your deponent personally to ask for the information desired in a gentlemanly and courteous way, and if the information is refused to further advise his office.

[fol. 95] Your deponent, in his various talks with numerous dealers in the Metropolitan Area, is led to believe, contrary to the assertions of the said Spielman in his affidavit that violations of the provisions of Article IV of the said Code are "rampant and wholesale," that the element among the dealers that is flaunting and violating the Code represents a very small percentage of the dealers in this district.

Your deponent is submitting the affidavits of dealers, attesting to the fact that they and their employees are reaping certain benefits under this Code, and many hundreds more such affidavits may be furnished if the Court so desires.

Your deponent recalls the incident of the queries made by the said complainant with regard to some of his fleet sales as stated in his affidavit. Your deponent took the question of permitting the said complainant to allow a discount in violation of the Code of the said customers of the said Spielman, and on determining the matter on advices given your deponent from the Washington authorities was obliged to advise the said Spielman that in the two instances involved the National Code Authority refused to give permission for the delivery of these cars.

John B. Hulett.

Sworn and subscribed to before me this 16 day of August, 1934. G. L. Schutzendorf, Notary Public.

[fol. 96] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HAROLD H. STRAUS

CITY OF NEW YORK,
State of New York,
County of New York, ss:

Harold H. Straus, being duly sworn, deposes and says:

That he resides at 1 West 85th Street, in the Borough of Manhattan, City of New York.

That deponent is an attorney duly licensed to practice law in the State of New York since 1907.

That deponent is a member of the firm of Messrs. Straus & Osserman, who have their principal place of business at 505 Fifth Avenue, in the Borough of Manhattan, City of New York.

That on the 3rd day of July, 1934, your deponent was specially deputized by Judge William C. Dodge, as District Attorney of New York County of the State of New York, as Special Assistant and counsel, and was sworn in as such special assistant District Attorney and counsel to the District Attorney by the Honorable Otto H. Rozalski, a judge of the General Sessions of the State of New York, for the County of New York, to prosecute in the name of the People of the State of New York any violations of the [fol. 97] Provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, and thereby became vested in accordance with the laws of the State of New York with the right and duty to prosecute said violations.

That on or about the 7th day of July, 1934, your deponent caused a summons to be issued against the complainant herein in the Commercial Fraud Court division of the Magistrates' Court of the City of New York, on application duly made in the name of the People of the State of New York, directing the appearance of the said defendant on the 9th day of July, 1934, before the City Magistrate holding court at the City Magistrates' Court at 300 Mott Street, in the Borough of Manhattan, City, County and State of New York, so that a hearing might be held on an information verified by one Jacob Gross for the violation of the provisions of Subdivision 2, Chapter 781, of the

Laws of 1933 of the State of New York, in that the complainant, its salesman J. Siegel, and its manager, one Weber, on or about the 26th day of May, 1934, offered to sell one Gustave Weinstein a Chevrolet car of the then retail market price of $720.80 for $675.80, thereby offering a discount of of $45.00 off list price, in violation of Article IV, Section B, Subdivision 2, of the Code of Fair Practice for the Motor-Vehicle Retailing Trade.

The said Code has been duly filed with the Secretary of State on the 5th day of December, 1933, in accordance with the said Chapter 781 of the Laws of the State of New York of 1933.

[fol. 98] Also that on the 29th day of May, 1934, the said complainant, Siegel and Weber sold to the said Weinstein the said car at a discount of $45.00 from list price, as aforesaid, which again violated the said Code, and more particularly in Article IV, Section B, Subdivision 1 thereof, references being herewith made to the said Code being filed with these papers.

That the said Complainant and said other defendants appeared at the Magistrates' Court on the 9th day of July, 1934, and a continuance of said hearing was ordered until the 13th day of July, 1934.

The hearing has further been continued and is now set for the 17th day of August, 1934.

That deponent desires to call this Court's attention to the fact that the complainant in no way sets forth in any of his papers submitted on this motion any facts in connection with the basis of the hearing now pending in said magistrates' Court.

Further, this complainant is being charged *not with a violation of giving an over-allowance on a trade-in transaction,* but that he is being charged with having offered and given a discount in violation of said Code.

Harold H. Straus.

Sworn to before me this 15th day of August, 1934.
Maxwell Sagat, Notary Public.

[fol. 99] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JACK FROST

CITY, COUNTY & STATE OF NEW YORK, ss:

Jack Frost, being duly sworn, deposes and says:

I reside in the City of St. Louis, State of Missouri.

I am the assistant to Mr. F. W. Vesper, the president of the National Automobile Dealers Association, which is a membership corporation duly organized under the laws of the State of Illinois.

The said Association is the one duly designated in the Code of Fair Competition for the Motor Vehicle Retailing Trade approved by the President on October 3rd, 1933, as the compiler and publisher of the official guide.

The monthly publication of the said official guide is prepared and published under my personal supervision and direction.

I also sit in at meetings of the National Control Committee as trade and business consultant and technical ad-
[fol. 100] visor.

I have been engaged in various phases of the business of retailing motor vehicles and long associated in the analysis of values of used cars.

I attended Stanford University and in my senior year I entered the United States Navy to serve in the World War.

During the period from 1918 to 1924, I was employed by J. Nadeau, Inc., which concern at that time was one of the largest automobile agencies of its kind in the United States; progressively as salesman and then sales manager.

Thereafter, and in 1924, I entered the automobiles business as a dealer in the retail sales of motor vehicles in Los Angeles, California, under the firm name of Frost & French. This concern is presently in business under the firm name of Frost & French, Inc., in Los Angeles, California, and I am still interested therein as a stockholder, being the vice-president.

In 1931, I organized the Unisales Service, Inc., which organization was incorporated under the laws of the state of California. This organization engaged in the business of sales promotion and dealt particularly with the subject of used car analysis.

I made an intensive study in connection with used car analysis for a period of approximately three years prior to this time and was recognized by the Ford Motor Company as an authority on this subject.

[fol. 101] The Unisales Service, Inc., operated with offices in fifteen of the major Cities in the United States and had in its personnel approximately one hunderd and eighty used cars experts including statistical experts, who were under my direct supervision.

This organization operated exclusively for the Ford dealers and itself was under the immediate direction of the Ford Motor Company.

I and Mr. M. E. Peters now on the National Automobile Dealers Association staff developed the formula for the publication of used car resale values and contracted with the Market Analysis Company, a Michigan corporation, for the compiling and publishing into book form of this information.

Due to the fact that the Unisales Service Inc. was practically alone in the field of scientific study and analysis of used car problems, it had among its personel individuals who were recognized as among those best trained in this field of endeavor.

Mr. M. E. Peters who was in charge of the market analysis organization, as well as other individuals in the Unisales Organization joined the National Automobile Dealers Association staff with me in or about the month of September, 1933. This provided the association with an already trained personnel and with valuable data with which to approach the task of building the official guide. Other experts such as Mr. Hubert Roy of the Ross Roy Service also joined the staff.

The formula for the development of the official guide was presented by Mr. M. E. Peters and myself to the Associa-
[fol. 102] tion, whose officials together with personal attendants presented all the facts thereon to the various Divisions, statistical and otherwise, to the Adminstrator in charge of preparing the Code for this Industry. This formula was only slightly changed when finally placed in the Code after close scrutiny and study by the National Industrial Recovery Boards.

The inability of the industry to pay fair wages and hours, because of losses sustained by them through the trade-in allowances given on the sale of new cars caused the Ad-

minstrator to finally approve and present the existing Code of Fair Competition for the Motor Vehicle Retailing Trade.

Various publishers had formerly issued so-called used car guide valuations and advocated the principle of "shock appraisels", which means the undervaluation of used cars. The effect of this on the public was to destroy their confidence in the dealer since the system thus followed was destructive to any confidence in appraisals thus offered and caused a vast amount of so-called shopping among dealers with resultant cut-throat competition. This principle was opposed by myself and other experts such as Mr. Peters and Mr. Roy, and finally most dealers. The principle of a best guide report was advocated by all those men and is the principle upon which we developed the official guide.

The foregoing is offered for the purpose of assuring this Court of the facts hereinafter stated.

I have read the affidavit submitted by Mr. K. J. Ammerman, and from my knowledge of the various investigations, [fol. 103] hearings and conferences held by the Administrator and Deputy, to the best of my knowledge I know the facts therein contained are true and correct. The conclusions arrived at are based on the reports that were submitted, some of which I assisted in preparing.

I have also read the affidavit of the complainant herein, as well as the affidavits of complainant's other effiants submitted in behalf of his motion to which this affidavit is submitted in opposition, and I have also read the bill of complaint against the defendant herein.

A reading of the aforesaid papers discloses that most of the statements made are general and are not specific. These general statements are not sustained by either fact or statistical information.

The Court should note the fact that the complainant in his papers admits that he is a violator of the Code.

Nowhere in his papers does the complainant aver that under the provisions of the Code, or the National Industrial Recovery Act, he has attempted to correct any of his alleged inequalities or inequities, through the Code has been operating as a law since October 3rd, 1933. All of the public hearings held before the Administrator and the other divisions of the National Recovery Administration before the adoption of the Code were open to the complainant to make its appearance and offer its suggestions.

The records of the National Automobile Dealers Association definitely show that the said complainant was certified to the National Automobile Dealers Association as a mem-[fol. 104] ber from the Empire State Association under date of August 10th, 1933. The hearing in Washington the Code of Fair Competition for the Motor Vehicle Retailing Trade presented by this Association took place on Monday, September 15th, 1933. The press of this country published the fact that this meeting was to be held on said date. The National Automobile Dealers Association in the issuance of its bulletin sent to every listed member likewise reported the date of the hearing. A copy of the said bulletin was forwarded to the complainant herein.

The complainant herein after a period of nine months since the adoption of the Code now for the first time endeavors to assail the Code and the laws under which it was enacted and after one of its violations has brought him to answer a charge in the criminal Courts of this State.

The Court will note that the complainant's papers evidence that fact that neither the complainant nor David Spielman are acquainted with the statistical angle and the real status of the industry since the enactment of the Code.

I shall now take up in somewhat more detail the conditions in the industry which brought about the necessity for the adoption of the Code and will then describe the form and operation of the official guide book as developed pursuant to the provisions of the Code. This will definitely point out that the trade regulations therein set forth are reasonable and for the benefit of the public, as well as the dealers.

Trade In Allowances

The dealer must necessarily conform with selling cars at prices satisfactory to the manufacturer, or else lose his [fol. 105] franchise. At all times a dealer can be put out of business should the factory with whom he has a franchise determine to cancel the same. With virtually no exceptions dealer or agency contracts in this industry are so drawn.

Were the problem only that of selling cars at retail for cash or on terms of credit, the only economic test of the sale of the cars would be the amount of competition between the various manufacturers of the various cars in a particular price class. In other words, that part of the public

desiring to buy Fords would go to a Ford dealer, and that part desiring to buy Chevrolets, which are in the same price class would go to a Chevrolet dealer. The dealers function would be and still is that practically of an agent, of the factory, and his profit would be and still is the discount or commission allowed by the factory. This permits of full and free competition between the factories in their particular price class, and accordingly the public has an open market to buy its cars.

The vice and trouble, however that has grown in this industry is due to the fact that the buying public desire to trade in their used automobiles when obtaining a new one from the dealer. In other words, a duel service is performed by the dealer, to wit:

(1) Selling new cars; and

(2) Disposing of customers' old cars.

The factories in no way desire to become involved in disposing of the old cars of the purchasers of the new, passing this onus directly to the dealer. The industry, therefore, has now found itself in the position where between eighty and ninety per cent of sales of new cars involve the disposition of old cars.

[fol. 106] I am able to state that ten years ago dealers were trading in approximately 22 used cars for every 100 new cars sold at that time it did not matter greatly if a dealer made an over-allowance on a used car because out of each 100 new cars that he sold there were approximately seventy-eight of them on which he made a full profit, inasmuch as no trade-in was involved. The dealer could, therefore, stand a loss of profit or price cut on the new car through allowance errors on the twenty-two used cars which he took in and still show some gross profit return.

In 1932 this industry has reached a point nationally where practically every new car sale involved the trade-in of a used car.

At the time that the Motor Vehicle Retailing Code was being presented to the N. R. A., the N. R. A. made a test of over five hundred dealers' costs of handling used cars, and it was found that the average costs of these five hundred dealers amounted to twenty-one (21%) per cent for handling and reconditioning the used car.

By 1929 the used car was such a hazard through new car price alteration that it became practically impossible to get salesmen to function in the capacity for which they were employed, namely, to go out and bring in business to the dealers' salesroom. After a salesman would spend the necessary time in developing a prospect and making an offer on the used car, in many cases, another salesman, would arbitrarily make a higher offer on the used car, with the result that the new car price set by the factory and beyond the dealer's control, was arbitrarily changed or reduced.

[fol. 107] This condition became so acute that sound methods were practically forgotten and buyers were converted into shoppers, and by constant increasing of allowances of one dealer as against another dealer. Factories attempted to stay these conditions by increasing their prices with over-allowance pads for the dealers. This caused new car prices to be thus raised to provide dealers with added margins for sustaining these losses. This system failed due to the inequity it worked on those buyers who had no used cars to dispose of. Some factories then required their dealers to show no gross used car loss in their operations. This failed since no measuring device was available and deemed reliable. This practice became so general that by 1933 it was reliably estimated that not over 5% of the automobile dealers in the United States were solvent.

By this time the income of salesmen had reached a point where nationally they averaged less than $900.00 a year. For the automobile salesman to maintain the scale of living requirements of his position and at the same time to support his family was impossible.

Banks refused credit to automobile dealers as such in view of the fact that the product which they sold had no established price, inasmuch as the delivered price of an automobile meant nothing when any dealer who chose to do so could alter this delivered price by merely increasing the allowance of a used automobile.

This naturally resulted in a terrific loss to the automobile dealers throughout the United States and a dissipation of their capital. The result was that all dealers who were [fol. 108] not encumbered by leaces which prevented them from going out of the business got out and salvaged such of

their remaining capital as was possible. The balance who were unable to close their businesses fired every employee that they possibly could, cut the wages of the remaining employees, and endeavored to continue only through the sufference of their creditors.

It is — well known fact that where a dealer's franchise previous to 1925 commanded a premium, and individuals sought dealer contracts, the result in 1933 was that the factory sought dealers of any type or character, under any sort of promise in order to secure representation. The franchise of a dealer had become almost entirely discredited and without value.

This condition is directly traced to the fact that there was no established price on a new automobile since this price could be changed by any dealer through merely increasing or reducing the allowance of a used car.

The attempts made in the past to meet this situation in the form of so-called used car guide books such as described above, proved inadequate.

When the market becomes a buyer's market rather than a seller's market in the economic cycles of industry, many dealers in this industry, in their attempt to keep their franchise or contracts with the manufacturers and so that they buy the quota of *ere-* required by the manufacturers, and trusting for better times, will chisel and adopt all practices, ethical or otherwise, for the purpose of meeting the [fol. 109] desire of the buying public's market, and either grant discounts from the new car's price, irrespective of what their profits therein would be, and oft times trying to save their profit to a limited extent by an average allowance on the value of the used car, or arranging to give the buyers of new cars insufficient and improper service under the guarantees; and when competition becomes keener at such period and in such a market it becomes the survival of the fittest among the dealers, which means that the little concerns which have small capital invested, by virtue of insolvency or otherwise, will have to go out of business and the larger concerns will lose such of their capital investment, or even with respect to larger dealers, also go into bankruptcy. Thereby an entire industry becomes disorganized, disrupted, and the greater number of its four million employees lose positions, and a major depression is on.

Now to correct these trade abuses, the President of the United States, viewing the same depression in other industries, and recognizing the emergency of the situation, created an act which title speaks for itself, to wit, the National Industrial Recovery Act, and Congress in its wisdom, realizing the hundreds of industries involved, gave power to the President to create administrative offices, to investigate the vices and abuses in various industries, and if emergency measures were needed, to create them so that codes of fair practice could be expeditely established and men be taught to conduct their business in honest fashion, so that those dependent upon the particular industry by way of labor, and the dealers themselves, should and could create a profit and creep out of the mire of depression. Accordingly, the Code of Fair Competition of the Motor Vehicle [fol. 110] Retailing Trade was adopted.

Pursuant to this Code, the official Guide Book was established in the manner provided in the Code.

Need for Official Guide

A report in the form of the Official Guide Book is a necessity not only from the standpoint of the dealer, but from that of the public as well. Without knowledge of all sales made within their trading area, any used car manager's or appraiser's knowledge of values was formerly limited exclusively to the cars which they had sold in their own used car department.

Over five thousand different makes, models and series of cars are in the hands of the public today, any of which may be offered at any time for trade-in. As a rule, a majority of the cars which the average dealer handles in his used car department are of the same make which he handles new. A used car manager's knowledge of values of other cars is necessarily very limited. The number of used cars he handles compared to the five thousand sorts of potential appraisals proves the need for such a Guide. It is, therefore, apparent that where all sales within a district can be reported to a control source and then made available to each dealer, that their knowledge of values of these cars is far more complete and their appraisals are far more accurate.

A report of all cars sold gives dealers accurate knowledge of what price the public is paying for such makes and models of cars, and therefore, they are able to offer the public what their cars are actually worth.

[fol. 111] This brings a standardization of value which makes possible the elimination of the faulty and unfair practice of paying more for one article than it is worth and on another article paying less than it is worth.

Method Used in Building the Official Guide

The National Automobile Dealers Association as made accessible to all dealers of record within the United States, forms upon which to report their used car sales. Copies of these forms are attached. Explanations were also sent out as to how these forms were to be filled in, as well as a sworn statement covering the fact that they were filled in correctly.

These used car sales report forms, upon being received by the N. A. D. A. are first serially numbered then sorted according to states and trading districts, then to makes and yearly models. Tabulation of these sales reports for the various districts in the United States is carried on prior to publishing the Official Guide Book each thirty days.

The Official Guide Book is published every month, using sales of the preceding sixty days, as provided in the Code. The method in which the report is assembled is as follows:

After the sales reports have been sorted to districts, makes, years and models and body styles, then the national average of each make, each year, each model and each body style is established. The Code provides that where five or more sales are reported from within a district that the average sale price shall be used after the twenty percent [fol. 112] of the low sales have been eliminated.

Each month the sales reported from each district are compared by makes and years to the national average, and their percentage to the national average carefully noted. A careful check is made of all sales reported from within the district, as well as the national averages, and charts are drawn showing the relationship of price between different makes of cars—for example, between Buick, Studebaker, Chrysler, and so forth.

Sales are also checked within the district, as well as nationally to establish the ratio of values between different

yearly models of the same make. Example: between a 1928 and a 1929 Chevrolet. This check is also made nationally.

The relationship of value between body models within a certain year is also checked, both within the district and against the national average. Example: the relationship in value of a five passenger sedan against a five passenger coach, and two passenger coupe, and etc.

Each month the current sales are checked against the averages of the previous period in order that our Statistical Department may accurately follow the appreciation or depreciation of cars from one book period to the next.

A dummy is then made up and the averages of each trading area are placed in this dummy and indicated. On such types where there were insufficient sales reported within a district to establish an average, the Code provides that the dealers shall establish the price, subject to the Administrator's approval. The Statistical Department projects a figure as a guide on such cars, based upon the date above [fol. 113] outlined. Example: if there were ten body models in a particular make and year of car, out of which only five had had sufficient sales reported to establish an average, the Statistical Department projects—figure as a convenient guide for the dealers who are called to establish this price in lieu of an average on the remaining five body styles. These figures are based on the percentage relationship of this particular make, yearly model and body style, within this particular district, to the national average figures, as well as the other data explained above.

These dummies are then sent to the dealers, to establish prices on such cars where there are insufficient sales reported to record an average. The dealers handling the particular make either revise or accept the projected figures which were established by the Statistical Department for their convenience. The average figures, cannot be changed by the dealers.

After the dummy has again been reviewed by the Statistical Division and all data checked and written up in journal form for the Administrator, it is published in its final form—the Guide Book.

Report of Best Grade Cars

The complainant entirely avoids the big point in connection with the building of the Guide Book as a report con-

cerning the value of best grade automobiles. Irrespective of any contention that an average, of necessity, must be [fol. 114] built from samples which range in value above and below the average, two other elements enter in connection with the practical use of the Official Guide, and its basic principle of reporting the value act by the public on the best grade cars.

The first consideration is one of time. By reason of the compilation of sales from a period sixty days previous to the physical compilation of such sales; the element of time thus entering gives the finished book in the current and practical use of the book a figure from which the current market has dropped away. In a rising market, it faithfully reports the rise and then when the inevitable decline starts again, it reports high for another two months. Obsolescence and/or wear causes automobiles to decline in value. Example: a new 1923 car never used would today only be worth a small percentage of its 1923 value.

The average rate of depreciation on motor vehicles will run from 2½% per month to 3½% per month dependent on the price class upon which the rate is figured. Consequently, it is obvious that as such as 7% depreciation can have occurred on an automobile between the time of its sale to a user—consumer, and the time sixty days later when such sale is tabulated with others into an average.

The time element enters again in connection with the tabulation of these sales reports and the final printing and shipping of the finished books to the dealers for used in the current market.

The books are issued each thirty days and are built from [fol. 115] sales of the previous sixty day period, but the tabulations necessarily are cut sufficiently after the sixty day period to permit statistical operations and printing and shipping. Effective dates for use are set to permit these operations.

We are, therefore, able to conclude that each appraisal controlled by the book is made on a car which has actually depreciated at the time of the appraisal from the value which was established on it at the time of its previous sales, which sale was used in publishing the report.

The resultant effect of this method must be considered. Current practical use in appraising with the book must recognize that as much as 7% depreciation can have oc-

curred in the car's value at the time appraisal is made. The last appraisals made at the end of each month, therefore, will include instances in which the appraisal is based on a resale average developed from reports sent in ninety days previous to the actual making of this particular appraisal.

In this instance, as much as 10½% depreciation can have occurred in the value of the automobile being appraised.

The second major element which is not considered in the complainant's attack on the "average principle" is the deletion of the lowest 20% of these sales which are used to make up the averages. This is a mandatory code provision.

By reason of this provision, sales which concern "junk" or wrecked cars are automatically eliminated from any consideration in the average, but so also are sales which are [fol. 116] not of such a nature as to be termed junk or wrecked types. The deletion of the low 20% eliminates from use in the average finally tabulated, many sales which run within a few dollars of the median average of all samples concerned.

The deletion of the low 20% removes vast numbers of sales which are close to what would otherwise be the arithmetic average of all samples concerned.

The effect of this deletion, therefore, is to throw the resultant or reported average high up into the bracket of those sales reported which were of the highest value.

A practical examination of the statistics involved in the compiling of each book will quickly demonstrate and prove that the resultant averages published in the book are not only in this higher bracket, but on an examination of an average of these sales which were the highest, we find but few which are not closer to the resultant published figure than in the arithmetic average of all samples close to the resultant published average.

Best Grade—Better Grade

It is an established fact that the difference between an automobile's value which can be termed best grade and the one which can be termed better grade is so slight as to be impossible of standardization or measure. This difference can be likened to difference in individual appeal of color or style in articles of similar value and price.

Practically, we find that the public purchases used automobiles of the better grade quite as readily as they do auto-
[fol. 117] mobiles of the so-called absolute best grade.

We find further that the public is unwilling to pay a higher price for the car termed best grade than for the car termed better grade. The public will purchase that which they determine is best grade as preference over that which *is* they believe is better grade, if the purchase can be made at virtually the same price and should the particular color or outward appearance appeal to the individual and influence his desire.

A review of the facts pointed to above discloses that the official guide book published by the National Automobile Dealers Association is in the final analysis a market report concerning the value of best grade automobiles.

Analysis of Spielman's Sales Reported to N. A. D. A.

All of the reports of used car sales made by the complainant to the National Automobile Dealers Association have been examined.

In analyzing these sales during the period of this Code, we have compared each sale to the Official Guide Book figure current at the time the complainant made such sale to a consumer. We are entitled to conclude that if the analysis of these transactions which are set forth in detail below is properly viewed, then complainant has definitely indicated that the prices reported in the Official Guide Book were far too high if compared with their particular sales of used cars.

Three hundred and seventeen sales of the complainant
[fol. 118] reported to the Association by it were made at less than the amount of the figure published in the Official Guide current with such sale.

Eighty-seven sales of the complainant reported to the Association by it were at an amount greater than the figure published in the Official Guide current at the time of such sale.

Seventy-eight plus per cent. of complainant's sales were lower than the Official Guide.

Twenty-one plus percent. of complainant's sales were higher than the Official Guide.

The complainant have reported since the beginning of the Code and to August 11th, 1934, four hundred and

twelve used car sales. Eight of these four hundred and twelve were incomplete reports and are not used in this analysis. They were used in compilation when received, but date of receipt cannot now be determined.

If the complainant is willing to allow (for a used car taken in trade on a new car being sold) an amount equivalent to that which complainant could sell such used car for to another buyer, the complainant, therefore, could have allowed three hundred seventeen new car purchasers —total sum of $3342.50 more than they apparently did and still make such allowances under this Code. This is an average of $10.54 per car greater amount they could have allowed than they were able to sell these used cars for.

Furthermore, if the complainant had allowed the maxi-
[fol. 119] mum provided by the Official Guide, then on these three hundred and seventeen sales they would have allowed $74,150.00. They sold these three hundred and seventeen cars at a total of $70,807.50.

They would have thus suffered a direct loss of	$3,342.50
If they paid the usual 5% commission to salesman for these sales, the cost would be	$3,540.38
If they spent the average reconditioning cost per car needed to even fairly insure satisfaction to the used car consumer, they would have spent an additional	$7,186.95
Total loss	$14,069.84

In the instance of those customers whose cars they sold at greater price than the Guide and whom they would have allowed (had no Code limitations affected their business) more money predic-ted upon their allowing the new car purchaser an amount equal to that which they could obtain for the used car in the sale of it to another consumer, they could have allowed eighty-seven purchasers an amount of $49.13 car more than they were able to under the Code limitations.

Had they allowed the eighty-seven new car purchasers whose cars they sold in excess of the Guide prices, the total of the sales price obtained, they could have allowed each of the eighty-seven $49.13 per car more than the maximum provided in the Official Guide.

[fol. 120] If they paid 5% commission to salesman to sell

these cars, this cost would equal $15.00 per car. If they spent the national average per car of reconditioning costs it would equal $26.56 per car.

This total of commission and reconditioning expense—$41.56 per car. This leaves $7.57 per car more than the complainant would have allowed each of these purchasers of new cars whose used cars they sold in excess of the Guide. If he deducted for his salesman's commission and reconditioning expense which is a regular trade procedure.

If the complainant's interest in its customers is as faithful as it contends, we are at a loss to understand how they divided this interest between the two types of consumers.

The Official Guide Book prices are high prices and a report concerning the value of best grade automobiles. This is proven even in the instance of complainant which concern was unable to sell seventy-eight plus per cent, of its used cars at prices as high as the Guide.

We have proven that complainant either lost $14,069.84 on three hundred and seventeen transactions, if it allowed the maximum which it elsewhere state- is the minimum, or it must admit the Guide is too high in seventy-eight plus of appraisals. In only eighty-seven transactions could they have allowed $7.57 average per car more to these eighty-seven customers and fairly paid salesman and paid average attention to reconditioning expense.

[fol. 121] A study of the actual average reconditioning costs attendant to the preparation of used motor vehicles by dealers for resale, reveals that the average amount per each yearly model of motor vehicle absorbs virtually all *of the 5%, 10% and 15% deductions* which are stipulated in the Code. An analysis of over one hundred and fifty thousand transactions demonstrates this fact. The obvious need, therefore, for the amount stipulated in the Code is easily proven.

Where the Code provides 5% for a particular group of automobiles, we find average reconditioning costs running 5.4% on low priced vehicles to 3.8% on high priced vehicles. Where the Code provides for 10% we find average reconditioning running from 7.7% on low priced cars to 6.8% on high priced cars. Where the Code provides for 15% we find the average reconditioning expense running for 17.2% on low priced to 12.6% on high priced vehicles.

These are the repair costs to the dealer alone and include

none of his needs for defraying handling costs, commissions, etc.

[fol. 122] Accurate Tabulations of Spielman Motor Sales Co. Inc. Used Car Sales Reported to N. A. D. A.

Complainant's Sales Under the Guide

317 Book Sales	83,686.00	Total of Guide.
317 Actual Sales	70,807.50	Complainant's sales.
	$12,878.50	
$12,878.50 ÷ 317 =	40.63	Average amount per car it sold less than book price.

Complainant's Sales Over the Guide
(10)

87 Actual Sales	26,069.00	Made by complainant.
87 Book Sales	24,296.00	
	$1,775.00	
$1,773.00 ÷ 87 =	20.38	Average amount per car sold over Book Price.

Total All Complainant's Sales

404 Sales Book	107,982.00	Total Official Guide.
404 Sales Actual	96,876.00	Complainant.
	$11,106.00	Book Sales over Actual Sales.
$11,106.00 ÷ 404 =	25.01	Average amount per car on total sales, which it sold under the gross Book.

Total sales value of all cars sold	$96,876.50
Total Net Allowance—Under Code and Official Guide	95,945.00
	$931.50

$931.50 ÷ 404 sales = $2.30 per car he could have allowed if he allowed the full amount that he sold the used car for.

[fol. 123] Accurate Tabulations of All Spielman's Used Car Sales Reported to N. A. D. A.

Spielman's Sales Under the Guide

317 Book Sales	$83,686.00	Total to Guide
317 Actual Sales	70,807.50	Spielman's Sales
	$12,878.50	
$12,878.50 ÷ 317 =	40.63	Average amount per car he sold less than book price.

Spielman's Sales Over the Guide

(10)

87 Actual Sales	$26,069.00	Made by Spielman
87 Book Sales	24,296.00	
	$1,773.00	
$1,773.00 ÷ 87 =	20.38	Average amount per car sold over book price.

Total All Spielman's Sales

404 Sales Book	$107,982.00	Total Official Guide
404 Sales Actual	96,876.00	Spielman
	$11,106.00	Book Sales over Actual Sales
$11,106.00 ÷ 404 =	25.01	Average amount per car on total sales, which he sold under the gross book.

Total sales value of all cars sold	$96,876.50
Total Net Allowance—Under Code and Official Guide	95,945.00
	$931.50

$931.50 ÷ 404 Sales = $2.30 per car he could have allowed if he allowed the full amount that he sold the used cars for.

This would cause Spielman to lose Salesmen's commission of 5% and reconditioning expense as indicated heretofore, as direct losses. In addition his cost of handling would be another loss.

[fol. 124] At the time that the Motor Vehicle Retailing Trade Code was being presented to the N. R. A., the N. R. A. made a test of over five hundred dealers' costs of handling used cars, and it was found that the average costs of these five hundred dealers amounted to twenty-one per cent for handling the used car.

Concerning Official Guide Book Averages

Since complainant handles the Chevrolet automobile, it is interesting to note the effect of Code Provisions on Chevrolet cars specifically. An analysis of one hundred thirty-three reported sales of a particular model of Chevrolet and concerning a 1928 automobile indicates that of this number of sales, one hundred and seven were used in the final calculations. The median average of the samples examined indicates that the average value is $60.00. Sales ranging from a low of $10.00 to a high of $40.00 were eliminated entirely from the tabulation of these samples which finally developed into an official price in the Guide Book. The highest sale eliminated amounted to two-thirds of the value indicated through the median average. The median average of these sales was $60.00. The published or resultant average printed in the Official Guide was $68.00 or 11.33% higher.

Taking another case, we point to an examination of one hundred sixty-six samples which after deletion of the low 20% left one hundred thirty-three samples with a median average of $465.00. The highest sale deleted from the calculations was $435.00, obviously not junk, being a sale at only $30.00 less than the median average. The price printed in the Official Guide, however, was $477.00 or [fol. 125] 10.65% higher. These samples are typical and therefore we can conclude that the Guide figures are 15% plus to 22% plus higher than any so-called average as is

contended by the complainant. We reach this conclusion through adding the average monthly rate of depreciation to the percentage elevation caused by the deletion of the low 20%.

Now returning to complainant's actual sales since the Code started, we point to the fact that of the 57 made at higher than the Guide, twelve of their sales were made at from 0.2% to 0.1% higher than the Guide.

Sixteen of their sales made in excess of the Guide were made from 1.27% to 2.95% higher.

Thirty-two of their sales made in excess of the Guide were made from 3.62% to 9.51% higher.

Fourteen sales made in excess of the Guide were 10.71% higher to 15% higher.

Six sales made in excess of the Guide were 15.38% higher to 19.42% higher.

Six sales made in excess of the Guide were 20% higher to 24% higher.

One sale made in excess of the Guide was 39% higher.

Tabulated in another way the eighty-seven sales made by complainant of used cars at prices above those shown on the Official Guide Book, were at the following differentials above the Guide Book prices:

[fol. 126] 21 at prices in excess of the Guide by $5.00 or less.
11 at prices in excess of the Guide by $5.00 to $10.00.
14 at prices in excess of the Guide by $10.00 to $15.00.
20 at prices in excess of the Guide by $15.00 to $25.00
21 at prices in excess of the Guide by more than $25.00.

Another example proving that the Official Guide Book is a report on best grade cars and shows high prices, is set forth here. On current cars, in many cases, the dealer may allow a price on a current model car which is actually in excess of the price that he pays the factory for this car now. We cite the example of a 1934 series "President C" Model Studebaker, on page 225, of the August issue of the Official Guide Book for District 2, which embraces Metropolitan New York.

The maximum allowance on a five-passenger Sedan is $1131.00 less the 5% mandatory reduction, which is $1074.45 net allowance, should the dealer wish to allow this amount. The factory list price of this same car is $1285.00. Assuming that the dealer receives a 25% discount from the factory

list price, or $321.00, this car would cost the dealer $964.00 new, plus freight. As a used car, however he can pay as high as $1074.45.

Consumer Interest

The number of used cars sold through the United States is approximately twice the number of new cars sold. If a dealer over-allows for a used car which is being traded in upon a new one, then in selling same he must either charge the buyer of the used car, which group out-numbers the new car buyer group two to one, and represents the poorer class, more than the car is worth, thereby taking [fol. 127] advantage of the used car buyer. Otherwise, he must absorb the loss himself, or take it away from his payrolls.

It can be readily seen that in handling approximately two cars for each new car sold, and in some classes dealers as high as five and six used cars for every new car sold, consumer interest must include this vast field of used car consumers.

If the complainant's interest in their customers extends only so far as those customers who purchase from them new automobiles, we can conclude that their desire to return to old methods of robbing Peter to pay Paul is in the interest of one consumer and to the detriment of the other.

It is further obvious that in view of the Official Guide establishing a sound report of value of best grade automobiles that those few sales which Spielman made of used cars at a price substantially higher than the price reported in the Official Guide can be considered as sales made to the detriment of this second type of customer.

It is apparent therefore, that the complainant's interest of these particular customers or their desire to return to old methods does not include interest in the welfare of buyers of used cars.

It is obvious that 78% plus of their sales going at amounts substantially lower than the book that this concern knew the Book was high. Further, they were so informed when they made these several higher sales to people thy probably victimized in an attempt to recoup other sales losses.

[fol. 128] Principle of Selling Cars for More Than Their Worth

The principles and methods necessary to selling used automobiles at more than their value is known to every member of this trade and is a principle which this complainant wishes to continue to the detriment of the more innocent among its customers. Deliberate selling of a used car for more than its true value can be accomplished through the misuse of confidence placed in the seller by a prospect who frankly asks for a fair and square deal, and permits the seller to indicate to him what car is proper for him and then takes the seller's word for the fact that it is a good and true value.

The complainant apparently wishes to continue this malicious practice of taking advantage of the innocent in this vast field of consumers who buy used cars, so that through its robbing of them, it may employ the trickery of price discount in the sale of new cars through the artifice of so-called "over-allowances" on used cars taken in trade.

It should be noted at this point that in these United States fully two times as many used car transactions are made each year as there are new car transactions. Those people who purchase used cars are generally a class of people in need of transportation and who buy used cars not as a preference to the ownership of a new motor vehicle, but by reason of their financial inability to enjoy the pleasure and economy of operation of a new car on account of its greater initial cost.

[fol. 129] The history of the automobile retailing trade clearly shows that if a lesser margin of profit is taken in the sale of the new car than is regularly provided when no trade-in is involved, then this loss differential must be taken from some other source.

Only three methods avail themselves to the dealer for the return to his coffers of this differential. Either it must come from his own capital, or from the payment of substandard wages to employees, or it must come from some innocent purchaser of the used car.

Revealing the condition of this industry prior to this Code, we can therefore, conclude that the distress in which it found itself arose largely from the fact that the great majority of dealers were inherently sincere and honest, and therefore were attempting to deal fairly with the public

and their employes. This conclusion we reach by reason of the fact that they were either unable to obtain from the more innocent purchasers of used cars an overcharge to compensate for the loss sustained through an over-allowance when selling a new car, or that they were unwilling to practice the trick and device necessary to the obtaining of this difference from their used car customers.

Another factor enters in connection with this same point. The public who purchase used cars and who have become experienced in such purchases have learned to shop throughout the market for the purpose of comparing values in order that they obtain a good used car at a fair price.

Consequently, the trade quite generally finds itself con- [fol. 130] fronted with a condition in which the public, or buyers of used cars, actually establish the value of such used cars. These buyers either refuse or accept the car offered at a specific price predicated on what they consider its value to be as compared to the same articles availability at a different price.

Letter Returning Sales Reports

In the affidavit of the complainant, reference is made to a letter sent, concerning used car sales which were questioned by the National Association (see page 13 of affidavit of Spielman). That letter was deemed abrupt and to some extent inaccurate. A letter of explanation was immediately sent following the letter mentioned.

This letter was a test made after the preliminary compilation of sales received for the months of September, October and November had been set in the form of a dummy, and submitted to the dealers of each district in order to supply a valuation where there were insufficient sales to establish an average. Upon submission to the dealers, we received a storm of complaints stating that the prices in the dummy were entirely too high, impossible of accuracy and of no value to the dealers.

In order to make a test to determine if dealers were accurately and correctly reporting their used car sales, sales were pulled at random from each district and sent back dealers, along with the letter referred to above. In some instances, these sales reports were returned with sharp criticism on the dealers' part for questioning same, and stating that they were absolutely authentic; while in other

cases declare returned sales reports with the notation that they were not filled out correctly.

[fol. 131] At the time this letter was sent, the Compilation Department of the N. A. D. A. was working under great stress in order to complete the first edition and place it in the hands of all dealers at midnight on November 30th, 1933. The letter which was sent out was written by one of the employees of the Compilation Department, and after being read by officials, it was seen that the letter was abrupt and inaccurate. We, therefore, immediately issued a letter, expressing regret for the abruptness of this mimeographed letter, and explaining why these sales reports had been returned. A copy of that letter is attached hereto marked Exhibit A and made a part hereof.

Furthermore, a public notice was printed in the N. A. D. A. official bulletin in connection with this same subject and since the complainant is a member of the Association, quite obviously, the notice reached it by either of the two means. A copy of the published notice is attached hereto marked Exhibit B and made a part hereof.

The right to make the test in connection with the letter referred to is obvious. The Code specifically provides for the use of sales reports from a period of sixty days previous to the period of compilation and at the same time evidence is herewith submitted showing clearly that the Association used reports covering a period of ninety days previous to the publication of the first official guide.

[fol. 132] Nothing in the Code stipulates that sales reports cannot be questioned when they are deemed inaccurate or carelessly rendered by members of the trade, but at the same time, the Association has specifically used each and every report offered it when the dealer has returned the report stating that it was correct. The practice of returning reports for questioning as to their accuracy is engaged in by many statistical organizations as a means of attracting the necessary interest on the part of the individual reporting to the need for accuracy.

The foregoing is the only instance of any general return of used car sales reports. All of the reports so returned were used in the compilation, after making corrections which were disclosed by this check.

Since that time reports have been questioned by the Statistical Department whenever there was an indication

of substantial inaccuracy. But such reports when returned by the dealer with corrections or with the statement that the original report was accurate have been used in all compilations. The final prices arrived at in all issues of the Guide Book have been determined in the manner hereinbefore described, and at no time has there ever been used any arbitrary figure. The prices published in the Guide Book have been at all times, the prices determined through the medium of averages developed correctly under the Code provisions.

New Car Price

The automobile dealer is in all practical ways an agent [fol. 133] of the automobile manufacturer insofar as the sales of new cars are concerned.

The automobile dealer does not stipulate what is the new car sales price. The new car sales price is established by the automobile manufacturer in the following manner:

From the price which the manufacturer established as his factory list price and which price is widely publicized, the automobile dealer is given a discount which, therefore, becomes his total gross profit. The amount of this discount is entirely under the control of the manufacturer. The amount of the factor- list price is entirely under the control of the manufacturer. In arriving at the delivered price to the ultimate consumer, this Code provides no major items over which the dealer exercises any control. The resultant delivered price, therefore, is the factory list price plus the freight to the destination of delivery, plus the dealer's conditioning costs. The conditioning costs of new cars it should be noted are only a small fraction of the total consumer price, namely 1% to 3%. Even though we might admit that the dealer controls the amount of this conditioning cost, it must at the same time be admitted that such a small amount can in no way control the resultant consumer cost.

It can, therefore, be seen that since the Code permits the monetary reduction or elevation by the manufacturers, as well as the original establishment of the factory list price, that positively no price fixing is engaged in from the standpoint of the dealer. A truly free competition exists which

has the force and effect of keeping the new car selling price at the lowest possible point.

[fol. 134] No one make of automobile finds itself in the position of being considered by all prospective purchasers as the one and only best value. If the manufacturer of — car brings his price too high, then, obviously the manufacturer of — car in the same price class will immediately enjoy the lion's share of the business.

This element, therefore, effects all prices established by manufacturers on their new motor vehicles, and does so, quite naturally under a free com-etition with the public interest fully protected.

Since the dealer has nothing whatever to do with the establishment of the price of the new motor vehicle and since this Code in no way affects the establishment of such price, therefore, no price fixing is condoned in this Code within the true meaning of the term.

Monopoly

Monopolistic practices are impossible in connection with this Code by reason of the free competition which exists in connection with the establishment of new car selling prices and further by reason of the fact that no single manufacturer controls the source of supply of the commodity—new motor vehicles.

Each manufacturer is a free com-etitor of the other and any tendency toward price fixing detrimental to the public on the part of a single manufacturer or group of manufacturers is quickly met through the economic and competi-[fol. 135] tive forces of competition from those manufacturers willing to sell at lower prices. Thus, the public interest is entirely protected.

If the charge of monopoly is directed at those provisions of this Code pertaining to used car allowance, it should be considered from the angle of all basic elements which can enter into creating the monopoly.

First, the source of supply of the commodity is in no way controlled by the dealers. Addressing this point to the commodity termed used automobiles, it must be realized that the automobile dealers in no fashion control the source of supply of used automobiles which are to be sold to purchasers of used automobiles.

If monopoly is charged outside of control of the source

of supply, then it could only fall on the question of price control of the supply.

The automobile dealers have no means of controlling the price at which used automobiles may be sold to buyers of such vehicles.

In the dealer's Code no attempt is made to establish what price must be charged when selling (either as a maximum or a minimum) the commodity—used automobiles.

If, therefore, monopoly does not come into this Code through control of the source of supply, or through control of the prices of such commodities, the Code cannot be charged with such a factor.

The Code, in no manner, controls or effects the price at which each dealer may individually sell each and every [fol. 136] used motor vehicle which comes under his ownership.

The automobile dealer can be likened to the arterials between the source of supply and the market, but can positively not be charged with being more than one of a vast number of arterials.

In the oil fields we might assume that the source of supply of oil lies at the casing head. There are various ways of bringing this commodity to the market. One method may be tank cars over railroads. Another method may be truck tankers and another a pipe line.

Each has the right of establishing how they shall charge for the taking of this article to the market, and should the producer determine to pass his product through a particular arterial, the owner of such pipe may stipulate at what cost he will perform.

In the instance of the movement of used motor vehicles from the original owner, or source of supply, to the new owner or used car buyer, the automobile dealers' used car department is only one of many arterials. If it becomes the choice of the seller of the used motor vehicle to pass his product through the hands of the dealers to the ultimate consumer, then it, of necessity, becomes the dealers' inherent right to determine upon what basis he will handle the transaction. In no way is the purchaser of a new car, who at the same time desires to dispose of his old car prevented from making such disposal of his old car without the service of the automobile dealer.

[fol. 137] The automobile dealer, therefore, is merely

offering his service to the buyers of new cars and which service may be declined or accepted at the new car buyer's discretion. In this service, the automobile dealer assumes many risks and great liability through his acceptance of this used motor vehicle as part payment in lieu of cash for new merchandise for which he has already paid cash. He is without definite knowledge that he may sell it to anyone at a price as great as the amount of his allowance. Furthermore, in connection with the sale of this used motor vehicle, he must maintain his name and reputation as a fair merchant, while at the same time, he is forced quite often to extend credit over many months which oftentimes is attended with severe losses, which cannot be foreseen.

This dealer is further confronted with the absolute necessity (if and provided he is of honest intentions) of selling this used car at a fair and proper price commensurate with its value in order that the greatest number of his customers out of the total continue their confidence in his integrity as a merchant. The dealer has only slight knowledge of the condition of this used motor vehicle, at the time he accepts it in trade and even at the time he sells it, since it is physically impossible to predetermine whether a used motor vehicle will perform satisfactorily. Therefore, in the maintaining of his name and reputation he is oftentimes forced to make additional repairs after the vehicle has been tested out by a new user.

On page 16 of his affidavit, Mr. Spielman states;

[fol. 138] "By actual tabulation, the complainant has actually lost between 170 and 180 sales of automobiles which were later consummated by other dealers at prices prohibited by code regulation, the loss to complainant in dollar volume being well in excess of $100,000.00 in sales."

By this statement, Mr. Spielman speaking for the complainant, intimates that the only reason a prospect would purchase from any other dealer is because the other dealer offered more money. Mr. Spielman does not submit evidence of any one of these one hundred and eighty Code violations. We are unable to find any record of a single violation reported by the complainant to the N. A. D. A. or to the Code Authority.

It is the usual alibi of a dealer or salesman, when a sale is lost to a competitor, to immediately say that the other

dealer allowed more money Dealers or salesmen will never admit that they were outsold by some other dealer or salesman.

The most natural thing for a prospect to say to the salesman from whom he did not buy, when questioned, is that he got a better deal elsewhere. Many prospects are not brutally frank enough to state to the dealer or salesman that after contacting them, they either did not like them personally, or that they disliked their place of business, or that the contact they had with the firm did not lend confidence to them.

On page 16 of his affidavit, Mr. Spielman states:

[fol. 139] "The irony of the situation is impressive. Honest men, seeking out law violators, so that they might, in fact, receive an honest and true value for their property. Think of it, honest business men, urging other men and institutions to flaunt the law, so that a transaction involving the honest exchange of values, might be truly consummated.

We admit that it is difficult to picture an honest man, asking other men to violate a law, and particularly a law that has no penalty to the buyer. Mr. Spielman, however, does not disclose how the layman not in the automobile business can accurately determine the true value of a second hand car when 75% of the dealers themselves are unable to do so without the aid of exchange of price information.

He might have stated that he might not have been able to give the prospect what he would like to get for his used car, as it has not been an uncommon occurrence in the past, as well as today, for prospects to demand prices for their used cars amounting to twice what they were actually worth.

We make the assertion that the prospects themselves know the exact amount their used cars were worth is ridiculous, for up until the Official Code Book was published, there had never been accessible to either dealers or the public, any accurate report of what used cars were selling for. A used car is worth only what the buying public will pay for it, and not what the owner would like to get for it.

I have read the affidavits of Edna Sperl Burke, Harold Perfit and Alexander J. Hussell, duly sworn to the 21st day of July, 1934, and the affidavits of Henry Caplan and

[fol. 140] George Shapiro, verified the 23nd day of July, 1934.

I deny each and every allegation contained in each of said affidavits with respect to customer's refusal to accept the so-called "average" price for their used cars for trade-in purposes for reasons herein stated.

I further deny the allegations wherein the said effients recite that they lost customers because they could not pay the alleged actual value of their used car on a trade-in, and that the Code has a decided "unwholesome effect upon any dealer."

It is difficult for any dealer to state why he has lost a sale, and therefore, I question the statements of the said effients that they have lost the number of sales set forth in their respective affidavits due to the fact that they could not pay more than the Guide Book price for the used car.

Wherefore, I respectfully pray that the complainant's motion be denied.

Subscribed and sworn to before — this —— day of August, 1934. —— ——.

[fol. 141] EXHIBIT "A" TO AFFIDAVIT

National Automobile Dealers Association

We desire to express our sincere regret for the form letter which you received recently with reference to certain sales reports which were questioned by the Compilation Department and returned to you. This letter was unnecessarily abrupt, although unintentionally, and in issuring it we had in mind the necessity of obtaining certain positive reactions.

In compiling sales averages for the Official Guide, we received numerous complaints from dealers that the sales figures were extremely high and apparently inflated. In order to determine to what extent this might be true, it was decided to pick out certain sales reports from the records and return them to dealers.

In practically every instance we have received replies from the dealers advising that the sales reports were authentic and correct as submitted to us. This was the information we desired to obtain.

All sales reports received, including those returned, have been used in compilation, the only exceptions being in cases where the information was incomplete and the sale could not be traced to a definite body style. In such instances, which were comparatively few, the reports were returned to the dealer with the request for the necessary information, and upon return, they were then included in the compilation. We do this for the protection of the dealer and to insure accuracy so far as humanly possible.

Naturally, in a task of this size, particularly in the initial stages, there will be errors both of omission and commission. We are striving however to make the Official Guide a valuable working tool for the entire dealer body.

We desire to thank you for your prompt reply to our recent letter and again express our regret for having unnecessarily disturbed you, for which we trust you will accept our apologies.

Very truly yours, W. E. Blanchard, National Automobile Dealers Ass'n.

WEB-er.

[fol. 142] EXHIBIT "B" TO AFFIDAVIT

Excerpt from N. A. D. A. Bulletin, Dec. 11, 1933

"Our Sincere Apologies"

In view of complaints from dealers, who were instrumental in setting prices used in the first edition of the Official Guide, that the average sales prices listed were entirely too high, it was decided to test by question a certain number of sales reports to dealers in an effort to find out to what extent sales reports were being scrutinized by the dealers. This test was poorly handled in some cases; this we deeply regret.

Unfortunately, the Statistical Department in carrying out the task issued a form letter which was both inaccurate and unnecessarily abrupt, although it was entirely unintentional. It was our desire to obtain very positive reaction from dealers on this subject, and we are glad to say that in practically all instances, dealers to whom these reports were returned, have replied stating in no uncertain

terms that the reports they supplied to the Association were correct in all particulars. This was the information we desired to obtain, and in all cases the original reports were used.

The Association is interested only in publishing an Official Guide which will serve the great body of dealers thoroughly and without discrimination. We are rendering purely a reporting service and cannot be influenced by the demands of individual dealers or groups of dealers who may feel that their particular product is being discriminated against. Necessarily, in the preparation of the first issue of the Official Guide, which was a tremendous task, mistakes were bound to occur. However, these are being rectified and it is believed that the future issues of the Official Guide will reflect accurately conditions in the respective Districts.

May we again express our apologies to those dealers who received the form letter referred to and assure them that we had no thought in mind other than to protect their interest.

[fol. 143] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF K. J. AMMERMAN

DISTRICT OF COLUMBIA,
City of Washington, ss:

K. J. Ammerman, being first duly sworn, deposes and says:

I am a Deputy Arministrator in the National Recovery Administration, Washington, D. C., and was appointed Assistant Deputy Administrator by the Administrator on August 4, 1933. October, 1933, I was appointed Deputy Administrator to fill the vacancy created by the transfer of Col. R. W. Lee. I have been directly in charge of the administration of the Code for the Motor Vehicle Retailing Trade from October 1, 1933, until on or about July 26, 1934.

I received a degree in Mechanical Engineering from Lafayette College in 1916; for three years worked in the

automobile manufacturing and aircraft engine manufacturing department of Simplex Auto Co., a division of Wright-Martin Aircraft Corporation; I was a pilot in the United States Air Service in 1917 and 1918, with the rank of Second Lieutenant; for six years I was selling and sales manager of the Newark Branch of the Packard Motor Company; for three years I was assistant to the President of the American Car and Foundry Motors Company; I was sales [fol. 144] manager for Comet Engine Corporation one year and spent three years in Investment and Banking work.

Affiant appeared in official capacity and presided over the public hearing which was held September 18, 1933, for the purpose of preparing a Code of Fair Competition for the Motor Vehicle Retailing Trade, and is familiar with conditions in that industry and the circumstances which lead to the approval of the Code on October 3, 1833. Since the approval of the Code to July 26, 1934, I have been in charge of its administration and am fully acquainted with all matters pertaining thereto. My knowledge of the conditions existing in the Motor Vehicle Retailing Trade, which are set forth in this affidavit, is based, among other things, upon my own general knowledge, the testimony adduced at the public hearing, statistical and economic information furnished me and conferences with dealers representing both employers and laborers.

The automobile industry in the United States has developed, in the period of 38 years, from a minor industry to one that now comprises a position in the trade channels of the country that is exceeded today only by the retail distribution of food to the consumers.

In 1895 four motor vehicles were registered in the United States and at that time an automobile was considered a luxury. In 1930 the industry had developed to a point where the registration of motor vehicles is shown to be 26,545,281, and instead of being a luxury an automobile today is considered a necessity. It is vitally important to the conduct of every business enterprise in the United States. It is responsible for the development of the State, and is directly or indirectly responsible for employing one person out of every eleven workers.

[fol. 145] The automobile industry is divided into two distinct divisions, each considered a separate industry, but each dependent upon the other to a large extent: the

automobile manufacturer who manufactures and produces new cars and the motor vehicle retail dealer who distributes to and services new motor cars for the consumer. Unless and until the distributing agency of the Motor Vehicle Industry is efficiently and profitably conducted the effect will be adversely reflected upon the automobile manufacturer.

In 1929 there were approximately 44,000 automobile dealers in the United States, 90% of whom were engaged in the sale of new motor vehicles as well as used cars. The remaining 10% were engaged exclusively in the purchase and sale of used cars. In 1929 the new and used car dealers net sales were in excess of $6,200,000,000. There were 44,000 proprietors with 330,617 full time employees and 11,413 part time employees. The actual payroll for this particular industry was $528,987,607.

When the United States found itself crippled with economic paralysis the automobile industry, and especially the retail division, suffered severely, therefore dealers attempting to protect their capital investment and to continue operation if possible on a percentage basis, sought to dispose of their commodities in whatever manner they could. They sought every competitive business advantage, and many went so far as to deal with customers on the shady side of legitimate transactions. Because of the reduction in earnings the general public was not in a position to invest large sums of money in new or used machines. Their demand was for a lower priced car and, whenever a used car was traded in on the purchase of a new motor vehicle, the consumer usually demanded an amount in excess of the actual value of the used car he owned. Believing, as many [fol. 146] dealers did, a volume of business would increase their profit, they acceded to the demand of the general public and in their desire to complete a sale of a new motor vehicle very often granted an allowance on an old car which was far in excess of its true value, and when resold by them, they of necessity took a heavy loss. These competitive abuses continued until approximately 90% of the automobile dealers in the United States were either bankrupt or in such a financial condition that the period of their active business life would not exceed more than five or six months. Unscrupulous persons attempting to effect a profit out of the distressed condition of the trade worked

upon the harassed dealers and were able to purchase many cars and divert them from their normal channels to illegitimate channels and thus affected, to a large degree, those who were attempting to stabilize the industry at a personal loss. This decline continued to a point where, the capital investment in 1932 equalled approximately one-third of the capital investment of 1929. Employees who had depended upon this industry for livelihood found themselves without jobs. Some industries, dependent to a large extent upon the automobile industry as a consumer, were forced into bankruptcy, and compelled to refuce the number of employees because the demand for their goods had fallen and profits abolished.

In 1929 over 5,600,000 new motor vehicles were sold by manufacturers at a valuation in excess of $3,500,000,000. In 1932 this figure dropped to a trifle over 1,400,000 cars at a valuation of fraction over $793,000,000. This is shown to be a drop of approximately 75% in volume of business and value of sales. The same percentage is reflected in the retail trade showing that 75% fewer cars were sold in 1932 than 1929, and the value of those cars were reduced approximately 75%. In 1932 there were [fol. 147] employed 87,891 fewer people, which was approximately 26% of those employed in 1929. The average hourly wage rate for employees had fallen approximately 47% in comparison to the wage rate paid in 1929.

In an effort to prevent a complete collapse of business activities jurisdictions, state and local governments passed legislation attempting to protect the employers' business and prevent reduction in the wage rate of those few employees retained. This proved to be ineffectual. The control extended only to the borders of the state. Rather than improving conditions, the legislation imposed a penalty upon those operating in the jurisdiction of the legislative body. Many dealers and associated organizations removed themselves from that jurisdiction and operated in sections not so controlled. In this manner they disposed of all employees associated with them in the conduct of their business and re-employed a minimum of help in their new locality. The communities were affected. Depending to a large extent, as many communities did, upon various retail organizations within their boundaries they naturally found that when retail dealers left the community, they left

behind them many individuals unemployed, many stores vacant, reduced income from taxes, loss business for banking and credit institutions, and a general reduction in business activity and development within the community itself.

In 1929 more than $75,600,000 was paid by the retail automobile dealer- for rent or leases on the premises occupied by them. In 1932 the reduction was in proportion to the per cent of reduction in sales.

That automobile retail dealer, although attaining a high degree of importance in the trade and commercial life of the country, is to some extent different from the majority of industries involving so great a capital and upon which [fol. 148] so much depends. The automobile dealer is not located in definite areas, on the contrary he is found in the largest towns and in the hamlets, in every state and every county, and to a large degree in every community in the United States. He must be so located because of the exigencies of his business for he is not alone a salesman or a sales agency, but he services and repairs for the consumer the commodity he sells.

The Retail Motor Vehicle trade is one upon which many other industries are primarily dependent for their existence, and an industry upon which millions of persons are dependent for employment. It, furthermore, is an industry upon which the Federal Government, State, County and local government depend to a large extent for tax revenue.

Every state in the United States supplies materials used in the automotive industry, and employs directly or indirectly over 4,000,000 persons, and as has been previously stated, this includes one out of every eleven gainful workers. The automobile industry ranks first as a consumer for iron and steel; and as a consumer of certain commodities such as gasoline, rubber, plate glass, nickel, lead, mohair and upholstery leather, it exceeds by far its nearest competitor. It uses approximately 14.5% of the lumber used in the United States. It is responsible for the consumption of more than 85% of the gasoline consumed and more than 57% of the lubricating oils.

The destruction of the retail trade, as reflected in the motor vehicle factories, may be described to some extent by showing that in 1929 there were employed 427,459 employees receiving $775,478,810 in wages, while in 1932 the

number of employees was reduced to 229,800 and their wages reduced to $282,929,203. The capital investment in automobile manufacturing was reduced from over $1,950,-[fol. 149] 000,000 in 1929 to approximately $1,490,000,000 in 1932. This figure reflected in the manufacturing of automobiles ultimately reflected a reduction in employment and capital investment in those commodities dependent upon the automobile industry as a principal consumer of its goods.

The Motor Vehicle Retailing Trade employs a greater percentage of skilled help in its sales and mechanical departments and is indirectly responsible for employing more skilled help in the conduct of related trades than any other industry.

Through proper distribution, this particular industry has developed miraculously since it first established itself in 1895. Because of its tremendous size, its imports in trade, the huge amount of capital invested, the number of employees for which it is responsible, the industry has invited certain classes of persons who seek to profit through illegitimate means. Prior to 1929, when competition was not a large factor, the legitimate dealer was hardly affected by transactions conducted through "bootleg" dealers, and the "bootleg" dealer was notable to divert a sufficient percentage of business from the legitimate channels to affect the legitimate dealer.

When the trade was backed to the wall; when the members of the industry were faced with bankruptcy; the employees faced with loss of their jobs and the remaining few with a reduction in pay; when revolt was in its ranks; when the industry's standards were repudiated by those who entered the *the* trade during this critical period and were not alone satisfied to conduct their own business illegitimately, but invited others to participate and rally under its folds, and by standing together in dishonor, supporting each other in perpetrating a shame which was too much to face alone; when normal credit operations were dissipated; when the economic consequences were never considered in [fol. 150] "putting over a deal"; when profits were forgotten to attain volume; when every attempt to stem the tide of financial ruin proved disastrous and when voluntary sacrifices of a few were to no avail—the members of this dustry turned to the Federal Government for aid and assisted in preparing a program for recovery.

Local and state dealers organized and subsequently there was delegated power to a national organization to present to the National Recovery Administration a proposed program or Code. They accepted, as a necessary condition, certain regulations, in order to obtain benefits, some of which have already been realized. There was a specific regulation to protect members from the vicious habits of past trading activities. Effort was made to put operations on a sound business basis. Unless dealers realized a profit on cars handled, the independent dealer was doomed.

The industry itself found it impossible to control their own activities through organizations. They were slowly but effectively becoming disorganized.

Governmental supervision was the only means of saving the Motor Vehicle Retailing Industry. The industry was fast dropping from the primary trade position it had attained over a short period of years. It was losing the prestige it had struggled to build. It was tragic to record and recognize these facts, yet it was true.

The complete and utter breakdown of this industry, which brought it to the verge of bankruptcy and disorganization is evidenced by the impossibility of the industry to become self-governing without government support. Scattered as it was throughout the entire country, effective state legislation was impossible. The conditions and abuses which had to be remedied were not confined in their effort to any one locality since the industry was national in scope. [fol. 151] State legislation merely intensified the situation. Piece-meal diversified regulation was therefore no answer. Only the Federal Government was in a position to act promptly. The necessary comprehensiveness of any kind of regulation called for a national control that would deal effectively with all the complex relations between the industry and the consumer. The Federal Government was in a position to command the services of experts who had been trained to deal with the complexities of adverse economic conditions and whose knowledge of the matters and intricacies of business methods would enable them in their position to envision the economic picture as a whole and to effectuate a plan of regulation that would have been impossible if attempted by those whose commends cannot extend beyond state boundaries.

The past system of dealing in volume in the sale of new

cars rather than in profit was an operation that showed a tremendous loss to the dealer in both dollars and percentage.

To protect themselves from this, the majority of members of the industry proposed a uniform system by which the actual sale price to the consumer of new cars could be determined on an equitable basis.

Probably the greatest evil confronting the trade was in connection with the acceptance of a used car as a credit allowance, in excess of its actual resale value, on the purchase of a new car. In the past the only methods of determining the resale value of a used car accepted in trade on a new car was on the basis of individual opinions, or by the use of appraisal books. These appraisal guides as published, were based on unsupported reports furnished by some of the dealers. In this manner they were able to establish an allowance price to suit their own desires, and the consuming public was left with no available remedy except [fol. 152] to deal with those men in the manner prescribed by them, to their mutual detriment. The industry felt that this was discriminating against the customer and ruining the dealer. In an effort to abolish this evil, protect the dealer, protect the public, and insure an adequate return on sales, the dealers proposed a system by which the consumer alone established the allowance or appraisal price on used cars sold or traded in to retail dealers. This was by separating the nation into definitely identified trading areas. All dealers within that trade area furnished an organization, named by the dealers, with sworn reports showing the exact sales price received by them on each separate make and model of car. By using these figures, and in the manner prescribed by the Code, an average was struck determining the average used car allowance granted by dealers during a given period of time. In this manner the consuming public and not the dealer determined the maximum price to be allowed when the used car was used as a medium of exchange.

Accuracy in determining the correct appraisal price on used cars is essential not only to the dealer but becomes of the financial position these appraisal prices take in the community. Local and state governments have, in the past depended, and will continue to depend upon the appraisal value published, in determining the value of a used car for taxation purposes. Credit organizations, insurance com-

panies, banks, and other financial institutions accept the published valuation of a reputable concern as a true and correct valuation of the car. When this valuation is determined through subterfuge or some ingenious manner by persons financially interested it can be readily seen that financial activities may be affected to a large extent. When it is shown that the motor tax was 10.7% of all taxes from all sources in 1932, proper determination of true valuations is essential.

[fol. 153] The used car market formerly was a minor activity among the retail dealers, but today is of major importance.

Without having definite figures to show the trend of business today it is impossible to state definitely the actual value of the Code as adopted by this industry, and under which it is now operating. Surveys conducted by various agencies have definitely proven that the industry has benefited to a large extent because of the Code. They have been operating under its provisions and increased volume of sales and are now reclining profit on capital investment. Bankruptcy has been decreased; failures are practically unheard of; nearly every unemployed member of the trade has been reemployed; vacant stores have been reoccupied; credit has been established, and in general the entire aspect is one of glorious future.

A review of statistics showing the economic trend of the country for the last year will show definitely the effect of an efficient organization in the retail Motor Vehicle trade. The industry itself has absorbed thousands of unemployed and has been directly responsible for absorbing many thousands more. Manufacturers of automobiles have added to their personnel. Organizations dispensing gasoline and motor oils have increased the number of employees and increased the living wage paid them. The State and Federal Governments have employed millions of persons on improving local, State and Federal highways to accom-odate motorists, and to improve transportation facilities for the farmer and merchant in delivering their goods from the farm to the city, and from one locality to another in interstate commerce. Rail carloads of automobiles and automotive parts have increased. The use of motor trucks in interstate commerce has multiplied and is becoming more important every day. Revenue from taxes on new automobiles, gasoline, oils and various accessories has increased.

[fol. 154] When it is realized that 75% of the State highway bonds are passed on special motor taxes, the effect of this increase may be readily appreciated; and when it is understood that 72% of the automobile industry is carried on in the United States and these machines are distributed thru the retail dealers, it is not difficult to picture the effect of increased activity in this line.

K. J. Ammerman.

Subscribed and sworn to before me this 15 day of August, 1934. Lyman M. Mare, Notary.

(74593) Certificate of Frank E. Cunningham, Clk. of Sup. Court, Washington, D. C., that L. M. Mare is Notary Public of said District.

[fol. 155] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF K. J. AMMERMAN

DISTRICT OF COLUMBIA,
City of Washington, ss:

K. J. Ammerman, being duly sworn, deposes and says:

The President of the United States, pursuant to Title I, Section 2, of the National Industrial Recovery Act, on June 16, 1933, by Executive Order, appointed Hugh S. Johnson as Administrator for the Industrial Recovery and authorized him to appoint the necessary personnel to conduct hearings and do such work as would be necessary to effectuate the policies set forth in Title I of said Act. A copy of this Executive Order (No. 6173) is attached hereto, marked Exhibit "A" and made a part hereof. (Subsequent Executive Orders Nos. 6205-A and 6205-B, relating to the organization of the National Recovery Administration, are attached hereto, marked Exhibits "B" and "C" respectively, and made a part hereof).

Pursuant to the above Executive Order No. 6173, the [fol. 156] National Recovery Administration was established as an agency of the Federal Government for the

purpose of assisting the President in the administration of Title 1 of the Act. The Administrator is directly in charge of the agency, and immediately under him are Division Administrators. The various industries of the country have been grouped under certain generic classifications, and one or more of these groups are assigned to each Division Administrator, who has charge of the proceedings by which application for the Codes of Fair Competition for industries within these groups are received and heard, and for the administration of the name.

I was appointed Assistant Deputy Administrator on August 4, 1933; October 1, 1933, I was appointed Deputy Administrator to fill the vacancy created by the transfer of Col. R. W. Lea. I am directly in charge of the administration of the Motor Vehicle Retailing Trade Code, from October 1, 1933, to July 26, 1934, and I am now thoroughly familiar with the proceedings taken in connection with the administration of the Code of Fair Competition for the Motor Vehicle Retailing Trade, and with all Administrative and Executive Orders.

I. Application for Code

August 30, 1933, an application for Code of Fair Competition and proposed Code of Fair Competition for the Motor Vehicle Retailing Industry was submitted by the National Automobile Dealers Association, through a Committee appointed by them for that purpose, an organization shown to represent approximately 75% of the members of that Industry (now representing approximately 96% of members of the industry). The proposed Code was referred to members of the industry and local organizations [fol. 157] interested in the Code, and revised by the National Automobile Dealers Association in accordance with suggestions submitted. September 7, 1933, a proposed Code approved by representative members of the Association was filed with the National Recovery Administration, the filing of the proposed Code was announced by a Press Release #679, which was issued on September 5, 1933. A copy of the release is attached hereto, marked Exhibit "D" and made a part hereof.

II. Notice of Hearing

A public hearing on the proposed Code was set for September 18, 1933, and Notice thereof was mailed to all per-

sons, firms and organizations known to be interested. A copy of said Notice was also placed in all United States Post Offices and inserted in Trade Journals. A copy of the Notice of Hearing is attached hereto, marked Exhibit "E" and made a part hereof.

Notice of said hearing was also announced by general Press Release #679 of September 6, 1933, which is attached hereto, marked Exhibit "D", and made a part hereof.

III. Public Hearing

A hearing upon the proposed Code was held on September 18, 1933, in the Garden Room of the Mayflower Hotel, Washington, D. C., with Deputy Administrator R. W. Lea presiding. The meeting was attended by representative delegations from the industry and by representatives of labor organizations, including those of employees in the industry. At this public hearing all provisions of the [fol. 158] proposed Code were thoroughly discussed. All representatives were given every opportunity to be heard and afforded ample time to discuss any feature of the proposed Code. Briefs from representatives not attending were read into the record.

It having been the general trade practice of members of this industry to accept used motor vehicles in trade on new cars at an appraisal price determined by the individual dealers, using as a guide one of the numerous publications issued for that purpose, and it having been a general trade practice of members of this industry to retail new motor vehicles at list price plus definitely established handling charges, the Association incorporated in the Code Trade Regulation Provisions to protect members of the industry from vicious habits of certain classes of dealers who had established themselves in business and were operating during the chaotic period prior to the adoption of the Code.

To stabilize this medium of exchange, there were incorporated in the Code provisions establishing the method of computing the price all-wence on used cars and creating one organization to be responsible for the preparation of a publication of the official appraisal book for distribution to members of the industry.

Facts presented in favor of these provisions and facts presented in objection to these provisions were heard and considered.

IV. Revised Code Proceedings

After adjournment of the public hearing, representative [fol. 159] groups within the industry held a series of conferences with the administration to discuss the controverted questions arising out of the public hearing. At these conferences the matter of used car allowances and appraisals and trade regulations were thoroughly discussed and briefs, letters and telegrams relative thereto were read and considered. It was the opinion of a majority of the members of the industry and the administration that since it was an established policy of the industry to operate under similar regulations they should be included in the Code of Fair Competition. The revised Code, which met with the approval of the sponsoring association and a large percentage of the members of the industry, was then presented for final hearing.

V. Approval of the Code

On September 29, 1933, Hugh B. Johnson, Administrator for the National Recovery Administration, forwarded the proposed Code, as revised, to the President, with a letter of transmittal recommending the proposed Code be approved.

On October 3, 1933, the President approved the Code of Fair Competition for the Motor Vehicle Retailing Trade. A copy of the Code as approved, which contains a copy of the Administrator's letter of transmittal and the Executive Order approving the Code is attached hereto, marked Exhibit "F", and made a part hereof.

VI. Code Administrative Bodies

Pursuant to Article V of the approved Code, a State Advisory Committee for the metropolitan New York area (considered a State for Administrative purposes, Article [fol. 160] V-A1 was duly created in accordance with the method of selection therein provided and approved by the Division Administration, a copy of the letter approving the method of selection and members of the State Advisory Committee for the metropolitan state district of New York is attached hereto, marked Exhibit "G", and made a part hereof.

Pursuant to and in accordance with Article VI of the Code and Amendments to the Code, approved April 20,

1934, there was established an Emergency National Committee, selected in accordance with the method set forth in Article IV of the Code.

A copy of the Amendment, and a copy of Executive Order No. 6543-A, dated December 30, 1933, is attached hereto, marked Exhibit "H", and "I" and made a part hereof.

Pursuant to and in accordance with Article VIII of the approved Code, a National Control Committee was created, the method of selecting membership for said Committee being set forth in Article VIII of the Code.

In accordance with and pursuant to provisions of Article IV of the Code the United States was separated into certain districts, identified as market areas. For each such district there is established, from statistics obtained from dealers operating within that district, fair used car allowances or appraisal values, such values being established and made public in accordance with Article IV and Article VII of the Code. The City of New York is located in Market Area No. 2. An extract from an official publication containing used car allowance price lists or appraisal values is attached hereto, marked Exhibit "K", and made a part hereof.

[fol. 161]

Conclusion

At all times from the date of the submission of the first Code, through the final approval thereof, and the amendments thereto, the Administrator has afforded all members of the Industry the fullest opportunity to be heard on any of the provisions of the Code or its amendments. The Code, as finally approved on its composite results, represents practically the unanimous approval of the members of this industry and of the representatives of labor. The Code as approved seeks to provide self-government of industry with complete and adequate safe-guards in the form of administrative checks and supervision. The Code itself, as well as the National Industrial Recovery Act, provides, in the form of administrative remedies, complete and adequate public protection against abuse of power by the self-governing instrumentality, the Code Authority.

F. J. Ammerman.

Subscribed and sworn to before me this 15 day of August, 1934. Lyman M. Mare, Notary.

(74592) Certificate of Frank E. Cunningham, Clk. of U. S. Sup. Court, Washington, D. C., that L. M. Moore is Notary Public in local districts.

[fol. 162] EXHIBIT "B" TO AFFIDAVIT

Executive Order

Administration for Industrial Recovery

Pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933, and in supplement to my Executive Order of June 16, 1933, appointing Hugh S. Johnson to be the Administrator for Industrial Recovery under Title I of said Act, and appointing a Special Industrial Recovery Board, I hereby authorize the Administrator, subject to the general approval of the Special Industrial Recovery Board, to appoint the necessary personnel on a permanent basis, to fix their compensations, and to conduct such hearings and to exercise such other functions as are vested in me by Title I of said Act, except the approval of codes, or making of agreements, or issuance of licenses, or exercise of powers conferred in Section 3 (c), Section 6 (c), Section 8 (b), Section 9, and Section 10.

Franklin D. Roosevelt.

The White House, July 15, 1933.

(No. 6205-A.)

[fol. 163] EXHIBIT "A" TO AFFIDAVIT

Executive Order

Administration for Industrial Recovery

Pursuant to the authority of "An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate the policy set forth in Title I, Industrial Recovery, of said act:

1. I hereby appoint Hugh Johnson to be the Administrator for industrial Recovery under said title I of said act.

2. I hereby appoint a Special Industrial Recovery Board to be composed of the following members: The Secretary of Commerce, Chairman; the Attorney General; the Secretary of the Interior; the Secretary of Agriculture; the Secretary of Labor; the Director of the Budget; the Administrator for Industrial Recovery; the Chairman of the Federal Trade Commission.

The Administrator during the ensuing 30 days shall have authority, subject to the general approval of the Special Industrial Recovery Board, to appoint the necessary personnel on a temporary basis to conduct hearings and to do such other and necessary work as authorized under title I of said act.

Franklin D. Roosevelt.

The White House, June 16, 1933.

(No. 6173.)

[fol. 164] EXHIBIT "C" TO AFFIDAVIT

Executive Order

Pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933. I hereby prescribe the following regulation, modifying any previous order inconsistent therewith;

Any code of fair competition approved by me shall be deemed in full force and effect on the effective date as stated in the code: but after the approval of a code and as an incident to the immediate enforcement thereof, hearings may be given by the Administrator or his designated representatives to persons (hereby defined to include natural persons, partnerships, associations or corporations) who have not in person or by a representative participated in establishing or consenting to a code, but who are directly affected thereby, and who claim that application of the code in particular instances are unjust to them and who apply for an exception to, or exemption from, or modification of the code. Such persons so applying within ten days after the effective date of the code shall be given an opportunity

for a hearing and determination of the issues raised prior to incurring any liability to enforcement of the code, and the Administrator shall, if justice requires, stay the application of the code to all similarly affected pending a determination by me of the issues raised.

Franklin D. Roosevelt.

Approval recommended: Hugh S. Johnson.

The White House, July 15, 1933.
(No. 6205-B.)

[fol. 165] EXHIBIT "D" TO AFFIDAVIT

National Recovery Administration

Release #679

Immediate Release, September 8, 1933.

Motor Vehicle Retailing Trade Code

The National Recovery Administration today announced that public hearing will be held Monday, September 18, in Department of Commerce Building on the Motor Vehicle Retailing Trade Code filed by the National Automobile Dealers Association, claiming to represent 75% of the total volume of the industry. Deputy Administrator W. R. Lea will preside.

The code provides a maximum work week of 45 hours, except for salesmen and watchmen, and 52 hours operation for place of business. Maximum hours do not apply to executives and managing employees receiving $25.00 a week or more, or to emergency workers, but in these cases the average over 6 weeks is not to exceed 48 hours.

Minimum wage is fixed at -15 a week in cities of over 500,000 population, scaled down to $12. a week in towns less than 2,500 population. Full time outside salesmen with unrestricted hours and on commission basis are guaranteed a drawing account of not less than $17.50 a week in cities of 500,000, scaled down to $10. a week in towns of less than 2,500. For mechanics, the minimum wage is 50 cents an hour unless below that rate on July 15, 1929, and in no case less than 30 cents an hour.

[fol. 166] EXHIBIT "E" TO AFFIDAVIT

National Recovery Administration

Release #679-A

Notice of Hearing: No. 99

September 5, 1933.

Motor Vehicle Retailing Trade:

The above industry, as represented by the National Automobile Dealers Association, claiming to represent 75% of the total volume of the industry, has submitted a proposed basic code of Fair Competition, copies of which are available at the office of the National Recovery Administration, Room 3316, Department of Commerce, Washington, D. C.

The Code for the National Automobile Dealers Association in its present form merely reflects the proposals of the above mentioned industry, and none of the provisions contained therein are to be regarded as having received the approval of the National Recovery Administration as applying to the Industry.

Notice is hereby given that a Public Hearing on this Code will be conducted by the Administrator, beginning at 10:00 A. M., Monday, September 18, 1933, in the Garden Room, Mayflower Hotel, Washington, D. C., and continuing until completed. An opportunity to be heard (either in person or by duly appointed representative either by appearance or by sending a written or telegraphic statement) will be given to persons or groups who show a substantial interest as workers, employers, consumers or otherwise, in the effect of any provision of the proposed code.

Those wishing to be here must comply with the following simple requirements:

(1) A written or telegraphic request for an opportunity to be heard must be filed before noon on Saturday, September 16, 1933, with the Administrator, Room 4034, Department of Commerce, Washington, D. C.

(2) Such request shall state the name of (a) my person seeking to testify in the hearing, and (b) the persons or groups whom he represents.

(3) Such request shall contain a statement setting forth without argument, a proposal; (1) for the elimination of a specific provision of the Code; or (*a*) a modification of a specific provision, in the language proposed by the witness, or (3) a provision to be added to the Code, in language proposed by the witness.

(4) At the Public Hearings, all persons are regarded as witness-, arguments may be filed, but oral presentations will be confined to factual statements only.

[fol. 167] (5) In the discretion of the Deputy Administrator in charge of the Hearing, persons who have not complied with the requirements of paragraph (1), above, may be permitted at any time prior to the close of the Hearing to file written statements containing proposals for elimination from modification of, or additions to the code supported by pertinent information or argument. Such written statements must be condensed as much as possible.

Public Hearings are solely for the purpose of obtaining in the most direct manner the facts useful to the Administrator, and no arguments will be heard or considered at this time. Representation of interested parties by attorneys or specialist in permissible, but is not to be regarded as necessary. Industry, workers and the consuming public will be represented by special advisers employed by the Government.

Hugh S. Johnson, Administrator. R. W. Lea, Deputy Administrator.

[fol. 168] EXHIBIT "G" TO AFFIDAVIT

NRA

National Code Authority

Motor Vehicle Retailing Trade

1010 Pine Street, St. Louis, Mo.

April 28, 1934.

F. W. A. Vesper, Chairman.
J. Reed Lane, Executive Secretary, 324 Munsey Building, Washington, D. C.

Mr. F. W. A. Vesper, Chairman, National Control Committee, Motor Vehicle Retailing Trade, 1010 Pine Street, St. Louis, Missouri.

DEAR MR. VESPER:

After examination of the evidence submitted by you the persons herein named are recognized as having been duly chosen members and chairmen of the respective State advisory Committees.

This recognition is based on the evidence submitted by you, which evidence has been returned for filing in your vaults, with the understanding that upon request it will be resubmitted at any time for further examination or for permanent filing in this office.

Very truly yours, (Signed) K. M. Simpson, Division Administrator.

[fol. 169] EXHIBIT "I" TO AFFIDAVIT

Executive Order

Delegating Further Functions and Powers to the Administrator for Industrial Recovery

Pursuant to the authority vested in me by and under the provisions of title 1 of the National Industrial Recovery Act, and in addition to the functions, and powers heretofore delegated to the Administrator for Industrial Recov-

ery, I, Franklin D. Roosevelt, President of the United States, do hereby order that the following functions and powers be, and they are hereby delegated to the Administrator for Industrial Recovery:

(1) The approval of codes of fair com-etition, with the exception of codes for major industries (being in general those industries normally employing in excess of 50.00 employees) as so classified by the Administrator for Industrial Recovery, and with the exception also any code of fair competition imposed under Section 3 (d) of said title of said act.

(2) The approval of any amendment or modification to, exception or exemption from, or elimination of any one or more provisions of any code of fair competition.

(3) Nothing herein contained shall be construed as amending any previous delegation of power to any other Department of the Government.

Franklin D. Roosevelt.

Approval recommended: Hugh S. Johnson, Administrator.

The White House, December 30, 1933.
(No. 6543-A.)

[fol. 170] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RALPH EBBERT

CITY, COUNTY AND STATE OF NEW YORK, ss:

Ralph Ebbert, being duly sworn, deposes and says:

That he resides at 100 Carman Avenue, Lynbrook, New York.

That for the past fourteen years your deponent has been acting as manager of the Brooklyn Motor Vehicle Dealers Association.

That the said Association is a membership corporation organized under the laws of the State of New York comprising in its membership dealers engaged in the retail sale

of automobiles as well as dealers in accessories to automobiles.

That your deponent has the records of the Association under his supervision and control.

That the records of the Association show that the complainant, Spielman Motor Sales Co. Inc. has been a member of the Association since January 14th, 1925, and his active membership certificate number is 24, having been issued on November 13th, 1929. That complainant is still a member [fol. 171] in good standing to the date of the making of this affidavit.

That in the year 1933, your deponent caused various notices to be sent to all the members of its organization amongst the motor vehicle dealers. That notices were sent to all dealers of new motor vehicles in the counties of Kings, Queens, Suffolk and Nassau to the effect that a meeting would be held on July 19th, 1934, at the Garden City Hotel, Garden City, Long Island for the purpose of discussing a proposed Code for the Motor Vehicle Retailing Trade and expanding the Brooklyn Motor Vehicle Dealers Association so as to include dealers on Long Island, outside of Kings County, in an organization for Code purposes to be known as the Brooklyn and Long Island Automobile Dealers Association. That this notice of meeting was sent to the complainant herein.

That at this meeting the questions of the proposed Code were discussed and a Code then presented was unanimously adopted by the meeting, as well as a resolution expanding the membership of the said Brooklyn Motor Vehicle Dealers Association as aforesaid.

The next meeting was held at the Hotel St. George in Brooklyn on August 10th, 1933. Notices of this meeting were likewise sent to all Brooklyn new car dealers including the complainant herein. That at this meeting further provisions of the proposed Code for the said trade were again discussed.

At this meeting a representative of the Brooklyn Cham- [fol. 172] ber of Commerce spoke generally of Codes, the N. R. A. set up, and the Blanket Code then in effect.

That your deponent knows definitely that although David Spielman of said complainant received notice of these meetings, he did not attend to make any protest to the adoption of the proposed resolutions.

Your deponent further knows that at a meeting of the Board of Directors of the Brooklyn and Long Island Automobile Dealers Association, of which the said complainant is a member, there were designated three delegates to attend a District Advisory Committee meeting for the purpose of selecting its delegate to attend a meeting contemplated being held in St. Louis.

That the said delegate elected was one Theodore Southworth. That the said Theodore Southworth represented the said Brooklyn and Long Island Automobile Dealers Association and all the dealers in Brooklyn and Long Island at said meeting in St. Louis as well as in Washington subsequently. He also represented the other dealers in the Metropolitan New York District.

That the Brooklyn and Long Island Automobile Dealers Association has no record of any letters sent in protest of the Code of Fair Competition for the Motor Vehicle Retailing Trade from the said complainant.

Ralph Ebbert.

Sworn to before me this 15th day of August, 1934.

———.

[fol. 173] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HIRAM B. POPE

CITY OF NEW YORK,
State of New York,
County of Queens, ss:

Hiram Bates Pope, being duly sworn, deposes and says:

That he resides at 36 Rockrose Place, Forest Hills, New York.

That since 1916 your deponent has been affiliated with the Motor Trades Publishing Company, which for the past twenty-four years has been publishing weekly a magazine known as the "Automobile Topics," which is now considered as a trade authority in this industry.

That your deponent is the managing editor of this magazine and has for the past ten years been collecting statis-

tics and surveys with regard to the conditions of the industry, by preparing questionnaires, forwarding them to various dealers of the motor vehicle industry, receiving their returns, tabulating and compiling the composite figure so as to arrive at the true status of conditions at various times in the industry.

That the questionnaires when forwarded by your deponent are sent to dealers all over the United States, the [fol. 174] purpose being to get a distinct picture of the industry as a whole.

Also from time to time special questionnaires and data are secured in this fashion on pertinent questions in the industry from dealers.

That in an endeavor to determine conditions, and more particularly on or about June 12, 1934, your deponent forwarded a questionnaire to five hundred dealers distributed throughout the United States, both as to territorial location and representation with respect to the various makes of automobiles, as set forth in Exhibit A attached hereto and made part hereof.

This distribution of dealer names was effected according to a system which has been used over the past ten years in an effort to secure representative opinions constituting in effect a cross-section of the dealer viewpoint for the country as a whole.

Replies were received from forty-five states and the District of Columbia, and from representatives of twenty-nine different makes of car. Because some dealers represent only one make of car and others several makes of car, returns to the questionnaire represented four hundred and fifty dealer contracts. Three hundred and fifty-three replies were received, of which two hundred and sixty-eight were received from cities and towns of less than fifty thousand population, and eighty-five from larger places.

The percentages of answers to the various questions are as set forth in Exhibit B affixed hereto and made part hereof.

These answers to the questionnaire reflect definitely the following:

[fol. 175] Nearly 80% of the dealers replying directly to the said first question answered that the Code had improved their business. In view of the fact that the Code was introduced only six months prior to the issuance of the ques-

tionnaire the strength as well as the eloquence of the response is particularly significant.

As a result of the answers of the said 4th and 5th questions, and more particularly in Subdivision C of the said 5th question herein nearly 69% of the answers were in favor of more active enforcement against 6.2% answering negatively and 24.9% not answering at all, it is established that the preponderance of dealers are in favor of the Code and more rigid enforcement thereof rather than its abolition. If you disregard those who did not answer the question at all and merely focus your attention to those who answered yes or no, the preponderance shows about a 90% average of the dealers who answered being in favor of enforcement.

The question of the reasonableness of the existing Code of Fair Competition for the Motor Vehicle Industry can be gleaned from the 3rd question where by great preponderance of answers all dealers considered it fair not only to the dealer but also to the public.

All the foregoing information and tabulation is in the possession of your deponent.

I sent out once a month to a list of five hundred dealers, also representing a cross-section of the country, a green papered blank questionnaire in which I ask them what is helping their business, what is hurting it, what they consider the outlook for the next 30 days, and also some par- [fol. 176] ticularly confidential information as to the volume of their business, which I use in constructing an index figure which is widely recognized by the industry as an indicator of the state of trade.

Answers came in for my August 11, 1934, publication of the "Automobile Topics." The gist of these answers, compiled in the same fashion as was used in the questionnaire of June aforementioned, is that the Official Guide Book provided by the Code of Fair Competition for the Motor Vehicle Retail Trade, and more particularly therein mentioned in Article 4, Section 1 thereof, is somewhat belated in lowering the price of used cars in connection with the car's depreciation from month to month, more particularly so because of the new models that are being rapidly put upon the market by manufacturers.

A large number of dealers, exceeding more than a majority, believe that the prices listed in the Official Guide

Book are rather too high than too low. This information is gleaned not only from answers to this last mentioned green papered questionnaire but also from my conversation and contact with dealers in the Metropolitan New York area.

In all my surveys made weekly since December of 1933 no dealers have complained that the prices made mention of in the said Official Guide Book are not high enough. This points out pretty clearly that the average price arrived at from a compilation of sworn statements of the dealer, in pursuance to the Code, in arriving at the figures set forth for used car allowance, is a reasonable regulation of the trade.

[fol. 177] That for many years the firm of R. L. Polk Co. of Detroit, Michigan, has compiled data and issued reports with regard to passenger car registration. That they are today considered the authority for supplying information with regard to new car registration in the United States.

That your deponent, on behalf of the "Automobile Topics" magazine, has retained this service and has in its August 11, 1934, publication on pages seventy-two and seventy-three thereof, set forth in full the tabulation of this registration for all the states in the United States excepting New Jersey and Metropolitan New York, giving the number of registrations in each of the said states of the union of twenty-seven makes of cars.

The tabulation shows that for the first six months of 1932 a total of six hundred sixty-three thousand, six hundred and twenty-five (663,625) registrations of new cars were made; that in the first six months of 1933 there were six hundred eighty-two thousand, three hundred and sixty-seven (682,367) registrations of new cars made. For the first six months of 1934 there have been nine hundred ninety-five thousand, one hundred and twenty-one (995,121) registrations of new cars made. This substantially shows that the retailing business of this industry has advanced by leaps and bounds since the Code was adopted.

Wherefore, from all of which your deponent desires to advise this Court that the Code of Fair Competition for the Motor Vehicle Retailing Trade has been a source re-establishing the industry from its past chaotic condition. Should the Code be dispensed with, this industry would decline

and fall into the old cut throat methods of competition, chiseling, and eventually force the greater number of deal-
[fol. 178] ers into bankruptcy as well as create a large number of financial losses to those who might survive.

Hiram Bates Pope.

Sworn to before me this 15th day of August, 1934.
Alex Gente.

[fol. 179] EXHIBIT "A" TO AFFIDAVIT

"Test Poll" by Automobile Topics

Code of Motor Vehicle Retailing

(1) Has the automobile retail code improved your business situation? .....

(2) a. If so, in what way? .....
b. If not, why? .....

(3) Do you consider it fair?
a. To the public .....
b. To the dealer .....

(4) Is it being sufficiently enforced? .....

(5) If not, do you favor—
a. Its abandonment .....
b. Modification .....
c. More active enforcement .....

Remarks: .....

(No signature required.)

[fol. 180] EXHIBIT "B" TO AFFIDAVIT

"Test Poll" by Automobile Topics

Code of Motor Vehicle Retailing

	Yes	No	Blanks
(1) Has the automobile retail code improved your business situation?	270 (76.5)	75 (21.2)	8 (2.3)

	Yes	No	Blanks
(2) a. If so, in what way?			
b. If not, why?			
(3) Do you consider it fair?			
a. To the public	314 (89.0)	33 (9.3)	6 (1.7)
b. To the dealer	311 (88.1)	32 (9.1)	10 (2.8)
(4) Is it being sufficiently enforced?	63 (17.8)	278 (78.8)	12 (3.4)
(5) If not, do you favor—			
a. Its abandonment	31 (8.8)	133 (37.7)	189 (53.5)
b. Modification	45 (12.7)	91 (25.8)	217 (61.5)
c. More active enforcement	243 (68.9)	22 (6.2)	88 (24.9)

Remarks:

[fol. 181] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF OSCAR P. PEARSON

CITY OF NEW YORK,
STATE OF NEW YORK, —
County of New York, ss:

Oscar P. Pearson, being duly sworn, deposes and says:

That he resides at 273 West 73rd Street, Borough of Manhattan, City of New York.

That your deponent is the manager of the Statistical Department of the National Automobile Chamber of Commerce, which is a membership corporation organized under the Laws of the State of New York, having its office at 366 Madison Avenue and 46th Street, in the Borough of Manhattan, City of New York.

That this Association comprises a membership of passenger car and motor truck manufacturers with the trade name of the product manufactured by them, as shown on Exhibit A made part hereof.

That the Association was organized in 1913, and that your deponent has been affiliated with this organization since 1921.

[fol. 182] That since 1919 the Association has issued an annual pamphlet known as the "Automobile Facts and Figures", reviewing each year's condition in the automobile industry. That the last issue, known as the 1934 edition, has already been published and distributed.

That this magazine is recognized as an authority throughout the United States, as setting forth authentically the tabulation of all compiled data therein mentioned.

That the facts hereinafter stated have been compiled under the personal supervision of your deponent in connection with the issuance of the 1934 edition of the pamphlet known as the "Automobile Facts and Figures."

That a resumé of this 1934 edition of "Automobile Facts and Figures" shows that the sales exports and production during the first five months of 1934 indicate that recovery is the outstanding characteristic for the early part of the year 1934; employment in the industry gained as the year progressed, and by May, 1934, approximated 1929 levels, while hourly wage rates exceeded the highest 1929 levels.

In fact, the 1933 May employment for N. A. C. C. members shows 99,343 employees while the 1934 May employment shows 206,965 employees. These facts are based on monthly reports received from manufacturers. The figures on employment cover hourly factory workers only and do not include the office and other salaried employees receiving more than $35.00 per week. These facts have been compiled from the manufacturers of automobiles who are members of our industry.

[fol. 183] That the monthly retail sales of motor vehicles in the United States for the calendar year 1933 and the months of January to June, 1934, both of the last months being inclusive, have been compiled by me. These figures are reported by automobile and truck manufacturers who in turn obtain reports from their respective dealers throughout the United States, and which figures are in the possession of the said National Automobile Chamber of Commerce. These figures; so compiled under my personal supervision, show as follows:

1933	Total Motor Vehicles	1934	Total Motor Vehicles
January	94,214	January	89,982
February	81,503	February	143,721
March	97,731	March	232,485
April	148,833	April	273,943
May	192,076	May	256,201
June	226,154	June	276,111
July	206,825		
August	213,279		
September	181,629		
October	158,573		
November	112,559		
December	69,471		
Total	1,782,847	6 months	1,272,443

Oscar P. Pearson.

Sworn to before me this 15th day of August, 1934. Einas R. Henderson, Notary Public, Bronx County, Clerk's #50. (Seal.)

[fol. 184] EXHIBIT "A" TO AFFIDAVIT

Passenger Car Manufacturers

Trade Name	Member or Manufacturer	Address
Auburn,	Auburn Automobile Company,	Auburn, Ind.
Buick,	Buick Motor Company,	Flint, Mich.
Cadillac,	Cadillac Motor Car Company,	Detroit, Mich.
Chevrolet,	Chevrolet Motor Company,	Detroit, Mich.
Chrysler,	Chrysler Sales Corporation,	Detroit, Mich.
Continental,	Continental Automobile Co.,	Detroit, Mich.
De Soto,	De Soto Motor Corporation,	Detroit, Mich.
Dodge Brothers,	Dodge Brothers Corporation,	Detroit, Mich.
Duesenberg,	Duesenberg, Inc.,	Indianapolis, Ind.
Franklin,	H. H. Franklin Manuf. Co.,	Syracuse, N. Y.
Graham,	Graham-Paige Motors Corp.,	Detroit, Mich.
Hudson,	Hudson Motor Car Company,	Detroit, Mich.
Hupmobile,	Hupp Motor Car Corporation,	Detroit, Mich.
Lafayette,	The Nash Motors Company,	Kenosha, Wis.
LaSalle,	Cadillac Motor Car Company,	Detroit, Mich.
Lincoln,	Lincoln Motor Company,	Detroit, Mich.
Nash,	The Nash Motors Company,	Kenosha, Wis.
Oldsmobile,	Olds Motor Works,	Lansing, Mich.
Packard,	Packard Motor Car Company,	Detroit, Mich.
Pierce-Arrow,	The Pierce-Arrow Motor Car Co.,	Buffalo, N. Y.
Plymouth,	Plymouth Motor Corporation,	Detroit, Mich.
Pontiac,	Pontiac Motor Company	Pontiac, Mich.
Reo,	Reo Motor Car Company,	Lansing, Mich.
Studebaker,	Studebaker Corporation,	South Bend, Ind.
Stutz,	Stutz Motor Car Co. of Amer. Inc.,	Indianapolis, Ind.
Terraplane,	Hudson Motor Car Company,	Detroit, Mich.
Willys-Overland,	The Willys-Overland Company,	Toledo, Ohio

[fol. 185] Motor Truck Manufacturers

Trade Name	Member or Manufacturer	Address
Autocar,	The Autocar Company,	Ardmore, Pa.
Corbitt,	The Corbitt Company,	Henderson, N. C.
Diamond T,	Diamond T Motor Car Company,	Chicago, Ill.
Federal,	Federal Motor Truck Company,	Detroit, Mich.
G. M. C.,	General Motors Truck Company,	Detroit, Mich.
Indiana,	The White Motor Company,	Cleveland, O.
International,	International Harvester Co.,	Chicago, Ill.
Kleiber,	Kleiber Motor Company,	San Francisco, Cal.
LaFrance-Republic,	Sterling Motor Truck Company,	Milwaukee, Wis.
Mack,	Mack Motor Truck Company,	New York, N. Y.
Moreland,	Moreland Motor Truck Co.,	Los Angeles, Cal.
Schacht,	The LeBlond-Schacht Truck Co.,	Cincinnati, O.
Sterling,	Sterling Motor Truck Company,	Milwaukee, Wis.
Stewart,	Stewart Motor Corporation,	Buffalo, N. Y.
Walter,	Walter Motor Truck Company,	Long Island City.
White,	The White Motor Company,	Cleveland, O.

[fol. 186] In United States District Court

[Title omitted]

Affidavit of Albert B. Unger

City of New York,
State of New York,
County of New York, ss:

Albert Blogg Unger, being duly sworn, deposes and says:

That he is the Acting District Attorney acting in stead and place of William Copeland Dodge, District Attorney of the County of New York for the State of New York.

That as such District Attorney it is his duty to prosecute in the name of the People of the State of New York, for the State of New York, through the media of formal judicial proceedings any and all violations of the laws of the State of New York.

That by virtue of his said office and the powers thereby conferred upon him, said District Attorney on the 3rd day of July, 1934, specially deputized Harold H. Straus, whose affidavit is annexed hereto and made a part hereof, as special assistant and counsel to deponent, to prosecute in the name of the People of the State of New York, and for the State of New York, any and all violations of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade. That by virtue of the said deputization the said Harold H. Straus became vested with the right and duty to prosecute said violations.

[fol. 187] Deponent denies upon information and belief each and every allegation contained in each and every one of the moving affidavits. The sources of deponent's knowledge are the affidavits hereto annexed in opposition. The grounds of deponent's belief is the veracity and reliability of affiants therein and their intimate and thorough knowledge of the facts which they allege.

Deponent avers that the only prosecution brought against complainant herein was by the institution of a Magistrate's Court proceeding by the service of a summons upon complainant returnable on the 9th day of July, 1934, at the Commercial Frauds Magistrate's Court of the City of New York, located at 300 Mott Street, in the Borough of Manhattan, City of New York, in which complainant appeared, and the date of which was finallly set for the 17th day of August, 1934.

Deponent emphatically denies that he, the said District Attorney or the said Harold H. Straus, or anyone connected with, or employed by deponent's office, has made any open, public, or other statement or avowal of an intention to prosecute complainant herein for violation of the aforesaid Code, other than the pending proceeding.

Deponent affirmatively avers that the only prosecution commenced against complainant is the aforesaid proceeding now pending in the aforesaid Magistrate's Court.

Deponent avers that the District Attorney and the said Harold H. Straus, in the institution of said Magistrate's Court proceeding, and in the prosecution of complainant therein and thereby, have acted and are acting under and by virtue of the powers incident to the office of District Attorney, and the duties expressly conferred by such office, and are so acting only through the medium of a formal judicial proceeding.

[fol. 188] The District Attorney has not been specially designated under the terms of Chapter 781 of the Laws of 1933, to prosecute violations of said law, but has done so and is doing so only by virtue of the powers and duties of deponent as District Attorney, to prosecute all violations of law.

Deponent avers that the District Attorney has no intention of commencing or causing to be instituted any further prosecution against complainant, until complainant's rights, constitutional or otherwise, are adjudicated in the

present criminal proceeding pending against complainant.

Wherefore deponent respectfully requests that the application for a preliminary injunction herein be denied, and the bill in equity filed herein be dimissed.

Albert Blogg Unger.

Sworn to before me this 16th day of August, 1934.
Virginia McMorris, Notary Public, N. Y. County.

[fol. 189] In United States District Court

[Title omitted]

Affidavit of Frank N. McCoy, Jr., et al.

City of New York,
State of New York,
County of ——, ss:

——, being duly sworn deposes and says:

That he is —— of ——, which has its principal place of business at ——.

That said —— is a duly enfranchised dealer for the sale of —— automobiles, and that deponent has been in the automobile business for a period of — years and during that time has bought and sold hundreds of automobiles.

That he is familiar with the conditions prevailing in the industry prior to and since the approval and operation of the Code of Fair Competition for the Motor Vehicle Retailing Code.

That deponent has a substantial investment in the autobile business.

That despite the fact that enforcement of Code regulations has not yet reached a high degree of efficiency, conditions in the motor vehicle retailing trade have to deponent's knowledge improved since the approval and operation of the Code in that:

1. Cut throat competition is being eliminated.

2. Deponent's firm's business is in healthier condition.

[fol. 190] 3. Deponent's firm is employing more people than it did prior to the Code and its pay roll shows a substantial increase.

4. Working conditions such as hours of labor have improved.

5. Purchasers are now getting fair values for their used cars in trade, and greater values in the new cars they buy.

6. Dealers are prevented from selling new cars at below cost by not being permitted to allow to a customer more than the fair value of customer's used car traded in.

7. The inflation of list prices of new cars to provide for an over-Allowance on used cars taken in trade is being eliminated thus placing competition on the basis of intrinsic value rather than used car allowance, to the benefit of all concerned.

8. Deponent, because of the Official Used Car Guide Book, has suffered less losses than at any time prior to the approval of the said Code in the trade-in and sale of used cars.

The suspension of this Code, and especially of its cost protection features, in the form of an injunction by this Court, would immediately throw all dealers into vicious, cut-throat competition more brutal than ever before that could only result in the complete destruction of all the recovery gains that have been accomplished since the enactment of this Code.

As a practical business man, I appeal to the Court not to open the flood-gates of unbridled competition and engulf this industry again in chaos, insolvency and economic disintegration.

Wherefore deponent respectfully requests that plaintiff's application be denied.

——— ———.

Sworn to before me this — day of August, 1934.

——— ———.

[fol. 191] This form of affidavit was signed by:

	Name	Company	Place of Business	Franchised Dealer of	Years in Business
1.	Frank N. McCoy, Jr.	F. N. McCoy Co., Inc.	Peekskill, N. Y.	Buick	9
2.	Harry Gilbon	Gilbon Garage	Peekskill, N. Y.	Hupmobile	20
3.	R. M. Ayers	Ayers Motor Sales	Ossining, N. Y.	Chrysler and Plymouth	14
4.	W. H. Jackson	W. H. Jackson Auto Sales, Inc.	Ossining, N. Y.	Ford	9
5.	Frank L. Stevins	Paul Schund Co., Inc.	Peekskill, N. Y.	Chrysler and Plymouth	19
6.	R. Raubins	Tarrytown Universal Co., Inc.	Tarrytown, N. Y.	Ford	7
7.	S. C. Denike	Peekskill Garage & Service Station	Peekskill, N. Y.	Nash and LaFayette	18 Mos.
8.	Elizabeth J. Winkler	Cornelis Motor Inc.	Ossining, N. Y.	Dodge and Plymouth	14
9.	H. D. Geissler	Park Motor Sales Co.	Peekskill, N. Y.	DeSoto and Plymouth	2
10.	Leon Steinacker	Leons Garage	Peekskill, N. Y.	International Trucks	10
11.	Fred McCall	McCall & Rizzuto, Inc.	Ossining, N. Y.	Buick, Cadillac and La Salle	10
12.	Henry Heckman	Harmon Garage	Harmon, N. Y.	Chrysler and Plymouth	15
13.	V. O. Shankey	Shankey Motor Co.	Haverstraw, N. Y.	Ford	23

[fol. 192]

	Name	Company	Place of Business	Franchised Dealer of	Years in Business
14.	C. N. Allison	Allison's Garage	Haverstraw, N. Y.	Packard, Dodge and Plymouth	12
15.	Theodore Luce	Theodore Luce, Inc.	533 W. 57 St., N. Y. C.	Lincoln and Ford	8
16.	A. Egery	Nyack Buick Co., Inc.	Nyack, N. Y.	Buick and Pontiac	3
17.	James Breme	Careful Service Garage, Inc.	Haverstraw, N. Y.	Chevrolet	7
18.	Harold Driscoll	Driscoll Chevrolet, Inc.	Spring Valley	Chevrolet	10 Mos.
19.	Howard Kosel	Associated Motor Sales Corporation	Nyack, N. Y.	Dodge and Plymouth	26
20.	David E. Cordukes	Hamapo Auto Sales Co., Inc.	Suffern, N. Y.	Chevrolet	17
21.	H. F. Axt	Axt & Swanson	Spring Valley	Studebaker and Oldsmobile	9
22.	Harold P. Barker	La Fayette Motor Sales	Suffern, N. Y.	Ford	4
23.	C. R. Jones, Jr.	C. R. Jones Jr., Inc.	Nyack, N. Y.	Chevrolet	20
24.	Hogo Kolb	U-Go Service	Nyack, N. Y.	Chrysler and Plymouth	9
25.	John A. Golden	John A. Golden	Nanuet, N. Y.	Chrysler and Plymouth	20
26.	James M. Strickland	James M. Strickland	Spring Valley	Dodge and Plymouth	23
27.	Stewart W. Osborne	Monsey Garage	Monsey, N. Y.	Chrysler and Plymouth	13
28.	Albert A. Coneys	Albert A. Coneys	Nyack, N. Y.	Studebaker	12
29.	Alex Van Houten	Van Houten Garage	Suffern, N. Y.	Chrysler and Plymouth	8

[fol. 193]

Name	Company	Place of Business	Franchised Dealer of	Years in Business
30. George H. Kelly	Hensch & Kelly, Inc.	90-03 43rd Ave., Elmhurst, N. Y.	Ford	15
31. Max L. Habrich	F. N. Habrich, Inc.	139-14 Hillside Ave., Jamaica, L. I.	Oldsmobile	7
32. Wm. B. Jones	Wm. B. Jones, Springfield Garage, Inc.	Springfield Gardens, N. Y.	Dodge, Plymouth and Nash	22
33. Samuel A. Kaufer	Universal Car Sales and Service, Inc.	31-08 Northern Blvd., Long Island, N. Y.	Ford	17
34. Frederick C. Kengeter	Kenwood Motor Corp.	216-20 Jamaica Ave., Queens Village	Dodge and Plymouth	24
35. John E. Nachman	Nachman Motor Corp.	Queens Blvd. & Hillside Ave., Jamaica, N. Y.	Cadillac and LaSalle	13
36. Nathan Diamond	Diamond Motor Sales & Service, Inc.	Springfield Gardens, New York	Ford	1
37. A. W. Aylmero	Aylmero Garage	Peekskill, N. Y.	Dodge and Plymouth	10
38. Frank W. Kuhns	Wm. Wagner, Inc.	Bayside, N. Y.	Dodge and Plymouth	28
39. George J. Ryan	Ryan Sales & Service	207-02 Northern Blvd., Bayside, Queens.	Ford	12
40. Chris A. Winkler	Winkler & Schulter, Inc.	35-11 Prince St., Flushing, N. Y.	Ford	6
41. L. F. Jacod	L. F. Jacod & Co.	1739 Broadway, N. Y. C.	New and Used	20
42. Leo Picard	Picard Motors, Inc.	515 W. 49th St., N. Y. C.	Ford	19
43. W. E. Tarr	N. Y. Retail Branch Studebaker Sales Corp. of America.	615 W. 131 St., N. Y. C.	Studebaker	15

[fol. 194]

Name	Company	Place of Business	Franchised Dealer of	Years in Business
44. Alexander S. Low	Avon Motor Sales & Service, Inc.	3215 Broadway, N. Y. C.	Dodge and Plymouth	7 Mos.
45. W. H. Calswell	Caswell Motor Co.	651 W. 195 St., N. Y. C.	Ford	14
46. John N. Werring	Werring Chevrolet Co., Inc.	89-34 166 St. Jamaica, N. Y.	Chevrolet	4
47. E. Koeffel	E. Koeffel, Inc.	162-19 Hillside Ave., Jamaica, N. Y.	Chrysler and Plymouth	13
48. Bertha S. Goldberg	Payne Motor Co.	8625 Lefferts Ave., Richmond Hill.	Ford	12
49. H. F. Smith	Carth Motors, Inc.	Floral Park, L. I.	Ford	2
50. J. B. McAllister	Totten McAllister Motor Sales, Inc.	Little Neck, N. Y.	Ford	3
51. Arthur E. Wahlberg	Strong Buick	92-25 166 St. Jamaica, N. Y.	Buick and Pontiac	21
52. George C. Bond	George C. Bond	130-29 Merrick Rd., Springfield Gardens.	Chrysler	13
53. J. Wm. Klaess	Klaess Auto Corp.	1603 Far Rockaway Blvd., Far Rockaway	Buick and Pontiac	6
54. Thomas Drago	Mutual Motor Sales, Inc.	611 Manhattan Ave., Bklyn.	Pontiac	18
55. Steffen Bayers	Bayers Chevrolet, Inc.	34-14 Steinway St., L. I. City, N. Y.	Chevrolet	12
56. Jos. P. Carbonaro	Greenpoint Auto Sales, Inc.	25 Bushwick Ave., Brooklyn	Chrysler and Plymouth	6½
57. Philip Siegel	Kay Motor Sales, Inc.	1756 First Ave., N. Y. C.	DeSoto and Plymouth	3

[fol. 195] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DAVID B. SPIELMAN

STATE OF NEW YORK,
County of New York, ss:

David B. Spielman, being duly sworn, deposes and says:

I am the President of the Spielman Motor Sales Co. Inc., the complainant herein, and am fully familiar with the facts herein.

That I did, on behalf of the plaintiff corporation, verify the bill of complaint herein, and that I did submit an affidavit in behalf of the complainant herein in support of its motion for a temporary injunction.

I have read the respective affidavits submitted by the defendant in opposition to the complainant's motion for an injunction pendente lite, and respectfully submit this affidavit in reply thereto.

As a preface to such reply, I desire to set forth to this Court, that the complainant is not alone in the position it [fol. 196] takes with respect to the marketing rules and provisions of the so-called "fair trade practices" of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

On August 11th, 1934, there appeared in the Automotive Daily News, which is the trade newspaper of the Motor Vehicle Industry, an invitation to retail motor vehicle dealers, to express their opinions with respect to the operation of the "trade in provisions" of the Motor Vehicle Retailing Code.

The Automotive Daily News, in its issue of August 18th, 1934, and in its issue of August 25th, 1934, reprints two of the succinct demonstrations against the Code price fixing provisions, which I believe clearly sets forth the position of the dealer, situated like the complainant herein, with respect to the marketing rules of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

Mr. R. H. Long of R. H. Long Motor Sales Co., of Farmingham, Mass., sums up his opposition to the Code in the following letter:

Finds Code a Conspiracy Which Hampers Dealers

By R. H. Long, R. H. Long Motor Sales Co., Farmingham, Mass.

"We are pleased to accept the invitation to state our views concerning the operation of the automobile code. We are much opposed to this code. When it was established dealers generally appeared to favor it, and we did not [fol. 197] choose to oppose the opinion of the majority.

"We mention the following reasons why the code is a calamity to the automobile dealers and manufacturers as well.

"First, it is an organized conspiracy against the good will of the automobile owners who are customers of the automobile dealers.

"It has reduced the volume of business beyond dispute. A comparison of the sales from July to December, 1933, before the code was established with the sales from January to June, 1934, shows a reduction in volume in business that dealers should have received of not less than 25 per cent. Business volume the first six months of any year should be at least 60 per cent greater than the volume of the six months of the preceding half year.

"Figures on this basis show the serious losses to automobile dealers.

"Fixing prices to be allowed for used cars is a very foolish scheme. An organized conspiracy that suggests employing spies and stool-pigeons is not a respectable adventure for any business. The whole scheme of the automobile code puts automobile dealers into straight-jackets and attempts to practice long distance management that can never be successful.

"The plan to fix the same price limit for all dealers to allow on used cars is unfair to the dealers and manufacturers of high priced cars. The automobile owner resents being denied the opportunity to bargain in a trade for his automobile."

In the issue of August 18th, 1934, the Automotive Daily News, reprints a criticism by Mr. M. H. Bury, of Bury & Holman, Inc., of Philadelphia, in which he states in part:

[fol. 198] By M. H. Bury, Bury & Holman, Inc., Philadelphia

"We welcome the attitude you have taken in the Aug. 11 issue of Automotive Daily News wherein you ask dealers what they think of the code and present code enforcement. Frankly, we think the code as it applies to hours and wages is excellent. True, we have suffered some har-ships in the matter of hours but have employed additional help to overcome this problem. Our wages, however, were equal to code requirements before the code was originally introduced.

"As to price fixing and the establishment of maximum used car allowances, we as a representative dealer with high merchandising standards have suffered. Our sales at retail are beneath those of last year, as are our retail gross profits. In addition to this, increased wages by virtue of other code requirements and increased general expenses such as the cost of code books, the amount of money we pay several times monthly for code enforcement, all coupled together have reduced net profits considerably.

"In our locality an able code administrator has struggled to overcome insurmountable difficulties; he has tried to be fair but has met with all kinds of opposition, both legal and otherwise. We are a corporation. Our books are audited once a month. The auditing is done in accordance with the standard practice of the Chrysler Corp., which brooks no irregularities such as might be used to cover up a code violation. Were there to be a code violation within this organization, our records would reveal it to any C. P. A. immediately.

"Other smaller dealers are not so fortunate, or unfortunate, as the case may be. They do business out of two trouser pockets, and their net financial statement at the end of any given month is computed on the basis of the increased cash on hand as of the end of one month over the end of the previous month. It is extremely difficult to prove the guilt of these dealers, yet we can point to several of them in the Philadelphia area whose volume in units has increased two and three times over their volume prior to code introduction. To compete with them is impossible under existing conditions.

"Of course, the solution would be to have the factories join forces with the code administrators and agree to cancel out dealers whose methods of doing business are irregular. This, as we say, would be a solution in that it would

elevate the business of merchandising automobiles to the dignified level of the merchandising of other commodities. [fol. 199] Its principal drawback, however, is that it would unquestionably cut down demand and therefore production, which in turn would reduce employment.

"We make this statement because we have talked to a large portion of the automobile buying public in Philadelphia who, if their car is in generally good condition, refused to let the government or anybody else tell them what it is worth or how much can be allowed for it.

. . . . . .

"A prospective purchaser with a car in exceedingly poor condition keeps shopping, as he did before the code went into effect, until someone allows him the limit.

"The prospective purchaser with a car in good condition either will not trade it at the limit of allowance or will shop around until he finds someone willing to violate the code, and there are plenty of these latter dealers.

"We keep a daily record of the number of people who enter our showroom, which is in a prominent metropolitan automobile location. We find that our floor contacts are less than 50 per cent of the number of contacts during the same period a year ago, and we attribute this strictly to the fact that we let it be known early this year that we would not violate the code or consider any subterfuge which might be considered a violation.

"Resultantly, our volume of profitable business is alarmingly low and the large percentage of our total business is the type earlier enumerated wherein the used car is in such terrible condition as not to be anywhere near code book figures. Our efforts to secure this business at a lower figure have for the most part resulted in complete failure.

"Summing up, therefore, our general reaction to the code is decidedly unfavorable. Furthermore, we do not believe that it will ever succeed without factory assistance, but also we are not advocating such assistance. We contend that the government should stick to the business of governing and leave commercial business to the millions of men througout the country who have been successfully attending to their business for many generations."

[fol. 200] When the newspaper reports of this litigation appeared in the daily press, the complainant herein was

favored by the receipt of a response from David H. Jones, Inc., 15 Valley Stream, South Orange, New Jersey, a Pontiac automobile dealer. The letter forcefully expounds the position of the complainant herein and I take the liberty therefor, because of its peculiar relevance to the issues in this case, to annex a copy of the said letter as exhibit "A".

I believe that the foregoing letters are sufficiently clear in themselves, to sustain the position of the complainant herein. Were it at all feasible to have every honest dealer express his honest opinion, in writing, an avalanche of discord and discontent would result. However, the fear that predominates amongst dealers, deters them generally from putting into writing their honest convictions. From personal conversations that I have had with hundreds of dealers, I assure this Court that the overwhelming majority of those I have spoken to, condemn the trade-in provisions of this Code.

I have carefully read the opposing affidavits submitted on this application, have studied and discussed them with my counsel and with statisticians and members of the industry, and I respectfully submit to this Court, that after an analysis of the said affidavits which I hereinafter set forth, the material allegations of the complainant's bill of complaint [fol. 201] herein and the assertions made by it in the affidavit submitted by me in supporf of this motion, are established either by admission or by the preponderating weight of the credible facts in this controversy.

There can be very little doubt that the most outstanding fact in this case is the unfairness of the "average" price allowance, both to consumer and more particularly, to the dealer; that the fixation of maximum "average" prices for trade-ins, has no relation to any just object of government; that by the attempt to enforce such provisions against the complainant, the complainant will be denied its constitutional rights, be hampered and restricted in the course of its business, to its great financial loss; that it has lost in the year 1934, as a direct result of this code provision, over One Hundred Thousand Dollars in sales, and that the continuance of this provision will further entail undue financial loss.

That if the defendant herein is not restrained from the threatened enforcement by threatened criminal prosecution of that provision, the complainant herein will be de-

prived of its property without due process of law, for the penalties for the violation of Chapter 781 of the Laws of 1933 are so drastic ($500.00 fine per day for each alleged violation) that the complainant may not accept automobiles on trade-ins at greater than the maximum "average" prices determined, even for the purpose of testing the validity of this very law. If the complainant violates the law, it is subject to the severe penalties prescribed therein. [fol. 202] On the other hand, if it adheres to the alleged law, it is thereby being deprived of its property, without due process of law, by reason of the unjust, illegal and inequitable restrictions imposed upon it, which have been and are destroying its business and its right to continue therein lawfully, without interference.

This type of action is the only form available to the complainant to test the validity of this law.

To further substantiate the assertions of the complainant herein, I refer this Court, respectfully, to an analysis of the answering affidavits submitted by the defendant. It will be seen from such analysis of the affidavits, that the defendant clearly manifests an attempt to distort the true facts and to minimize the basic grievance asserted by the complainant. This, to no avail, however, for the basic facts are undeniable.

Affidavit of John B. Hulett

John B. Hulett establishes that he is the Commissioner of the Metropolitan New York State Advisory Committee of the Motor Vehicle Retailing Trade, and as such it is his duty to secure compliance to the Code of Fair Competition for this industry in an area contemplating many counties of the State of New York and the State of New Jersey. [fol. 203] Mr. Hulett calls the Court's attention to the fact that the complainant admits violating the price regulation provisions of the said code. And in order to substantiate such point, makes specific reference to the Twenty-first Paragraph of the complainant's complaint. This is a bold attempt to distort the true facts. His quotation of the language of the complaint has been removed from its context.

In Paragraph Twenty of the complaint, the complainant states:

"That the complainant herein, in accordance with the policies of the Act of Congress expressed in the National Industrial Recovery Act has duly cooperated in the rehabilitation of industry and has duly complied with all provisions of the Code of Fair Competition * * *."

In Paragraph Twenty-One, it is stated that if the complainant would be permitted to offer actu-l, fair and honest values for used car trade-ins:

"that it would make a fair return and profit on its investment."

The tense of the verbs used and the general context of the entire complaint clearly display the intention of the drafter of the complaint to indicate that past experience would demonstrate that trading on a basis of "true values" of trade-ins would afford the Spielman Motor Sales Co., Inc., an opportunity to make fair profits.

[fol. 204] The affidavit submitted upon this application, in clear and uncertain language, sets forth the statement by the President of the complainant, David B. Spielman, that no violation of the code on the part of the complainant has ever transpired. To seize upon any possible ambiguosity to spell out an admission when all the papers in the argument before this Court have demonstrated otherwise cannot be characterized as fair.

Mr. Hulett further states:

"That at this point no monetary loss has apparently been suffered by this complainant."

In my affidavit, I clearly set forth that approximately 180 sales made by other dealers and lost by the Spielman Motor Sales Co., Inc., could be directly traced and that over $100,000.00 in sales had, as a result, been lost. It is hard to conceive how this statement does not clearly spell out a substantial monetary loss.

Mr. Hulett further states:

"That his complaint [referring to the complainant's complaint] is barren of any facts tending to show his version of the facts of the pending proceedings in the Com-

mercial Frauds Court Division of the City Magistrates Court."

I do not believe that Mr. Hulett can deny that there is present an intention and the actual threat of prosecution on the part of the defendant, William C. Dodge, District At- [fol. 205] torney for the State of New York at the instance of Mr. Hulett against the complainant for a violation of those provisions of the said Code of Fair Competition relating to price regulation. Whether or not the threat of prosecution relates to discounts or trade-ins is immaterial because the net result of both provisions is to establish a fixed price for the sale of a new car to prospective purchasers. The attempt on the part of Mr. Hulett to disqualify the present action on such thin pretense of technicality can only be interpreted in the light that there is certainly no desire to test this vital and important question on the part of this Administrator.

Irrespective, however, of the distinction between these provisions relating to price regulation, there is now pending threats of prosecution by the very Administrator, John B. Hulett, for trades involving trade-ins.

Mr. Hulett further states:

"That deponent avers, upon information and belief, that the said complainant has, since January 1, 1934, opened two new branches of his business which may account for the said Spielman Motor Sales Co. Inc.'s assertion that its payroll has increased more than 50%."

This is an obvious attempt on the part of this affiant to belittle the complainant and to display to this Court that representations made to it by the counsel for the complainant were in fact not true. While it is true that the complainant has opened two new branches of its business, this [fol. 206] does not vary the true facts. The facts are simple. Prior to the adoption of this Code of Fair Competition, the complainant employed, in its Brooklyn branches, which have been established for eleven years, 43 employes. At the present time, these branches employ 65 employes, an increase of approximately 50%. This figure is absolutely independent of the new branches opened in the Borough of Manhattan. It is proper at this point, to clearly set forth the policy of the complainant with respect to its

employes from the day of its very inception in 1923. The complainant has always made it a policy to pay its employes, from the lowly boy that helps the mechanic to the executive head of each branch, far better compensation than the average dealer in this particular area. This policy has been conscientiously pursued up to the present time; in fact, at the time of the adoption of the Code, wages paid to Spielman Motor Sales Co. Inc. employes were so high that the minimum requirements of the Code of Fair Competition did not alter the salary of any employe. This was so because they were then receiving wages far in excess of the minimum provided by the Code of Fair Competition. The only adjustment affected by the Code was in the revision of hours of employment. This accounts for the increase in the number of employes.

Mr. Houlett then states:

"That deponent knows of no affirmative step on the part of said complainant that he has enthusiastically cooperated to reemploy more people at a fair wage. As a matter of fact, a labor complaint was lodged against the Spielman Motor Sales Co. Inc. in the early part of February, 1934 with our Code Authority. On refusal of the said Spielman [fol. 207] Motor Sales Co. Inc. to sign a statement of the facts in the case, the file was held in abeyance."

We can think of no more definite illustration of "enthusiastically cooperating" than an actual increase in the number of employes to the extent of 50%.

This is more evident when the volume of sales in the Brooklyn Branches which increased their employe number to the percentage described, actually secured no increase in sales, so that the complainant voluntarily assumed an enormous additional burden to carry out its responsibility to the National Recovery program.

With reference to the labor complaint lodged against the complainant, much can be said. The question at issue in the complaint referred to was whether or not an "apprentice" could be employed in establishments engaging more than nineteen employes. The express provision of Article 3, Section (b), Sub-section 4 of the said Code of Fair Competition specifically states:

"and except that in establishments employing more than 19 employes, the number of such employes who are paid

less than $13.00 per week may equal but not exceed 10% of the total number of employes in any such establishment * * *."

At the time of the controversy, the complainant was entitled to employ eight such "apprentices" because it employed more than 80 people, but, in fact, only three people were so engaged. Mr. J. B. Hulett, as will be more fully described in this affidavit, sought every means and oppor-
[fol. 208] tunity to embarrass the complainant. Despite this express provision of the Code, he emphatically denied the right to the complainant to employ any one in the capacity of an apprentice. This case was taken up by the New York State Authorities of the N. R. A. but upon investigating the facts, they refused to act upon them because of the obvious provision of the Code.

At one of the hearings before Mr. Hulett, the President of the complainant, David B. Spielman, was urged to sign a legal document setting forth a set of facts inconsistent with the true facts which were to have admitted a violation of the Code. Though Mr. Spielman was not represented by legal counsel, he was urged to so sign if he desired to avoid "trouble". Despite this attempt at intimidation by Mr. Hulett, Mr. Spielman refused to sign and upon a display of the paper given to him for signature to his counsel, he was advised that no authority existed in Mr. Hulett to demand such a statement and that in fact such conduct on the part of Mr. Hulett was grossly unethical and unfair. The statement on the part of Mr. Hulett merely citing the labor complaint without advising the Court of its true disposition or the nature of the paper he desired the complainant to sign is a withholding of the facts from this Court tantamount to misleading the Court.

Mr. Hulett then makes reference to an affidavit of one Jack Frost and an affidavit of one Ralph Ebbert. These affidavits will be discussed when the said respective affidavits are analyzed herein. Mr. Hulett then states:

[fol. 209] "Your deponent calls the Court's attention to the fact that at least upon one occasion, soon after, the advent of the Code of Fair Competition for the Motor Vehicle Retailing Trade, he had a conversation with the said Spielman and tried to convince him of the great possibilities of the Code from the standpoint of the dealer and

was informed by said Spielman that while he was sympathetic and felt that the Code properly enforced would be a great benefit to all dealers, he would not sign compliance with the Code until he had further opportunity to discuss the matter with his factory officials and ascertain their attitude toward the Code with special reference to his connection with it in any way."

This statement is not true. I have, as the representative of the complainant, prior to the inception of the Code and at every trade meeting that I attended thereafter, emphatically denounced those provisions of the Code of Fair Competition relating to price regulation. My attitude has been consistent, i. e., simply that such Code provisions could never effectually operate and that in the course of time it would cause the entire collapse of the Code structure. Though the complainant has complied with these price regulations to the present time, I have never, as its representative, ever committed any act that would demonstrate the assent on the part of the complainant to such arbitrary and unworkable provisions.

As a matter of fact upon the printing and distribution of the first guidebook establishing maximum used car price allowances, I had considerable difficulty in securing such from Mr. Hulett because I refused to sign a membership [fol. 210] blank in the National Automobile Dealers Association, and a certificate of compliance which provided for a confirmation on the part of the complainant to all of the provisions of the said Code of Fair Competition. This position taken by the complainant was not taken in order to disrupt the administration of the Code but to consistently object to those "fair trade practice provisions" relating to price regulation. One instance is outstanding in my mind. One of our executives, at my instructions, appeared at the office of Mr. Hulett and requested the guidebook and offered to pay for the same. Mr. Hulett refused the tender and demanded the signing of an application to join the National Automobile Dealers Association. This executive refused and upon his return I then made my way to the office of Mr. Hulett. It was only after I had told Mr. Hulett that I would not be responsible for Code violations by the complainant due to lack of knowledge of the prices contained in the guidebook because of his refusal

to avail the complainant of its use, did he listen to reason. Only after I had signed the following statement:

"You are hereby authorized to distribute the money for our subscriptions as you desire with the distinct understanding that in no way whatsoever are we to be considered as a member of the Motor Vehicle Retailing Code Administration of Metropolitan New York. This letter is sent for the sole purpose of subscribing to the official guidebook Used Car only.

(Signed) David B. Spielman."

did Mr. Hulett permit the complainant to have a copy of the guidebook. It is indeed difficult to possibly understand [fol. 211] that after the extreme inconvenience that the complainant has been put to in support of its position that Mr. Hulett could possibly state that I, representing the complainant, was sympathetic with the price regulatory provisions of the Code of Fair Competition. Despite our avowed position, as above indicated, the complainant has always complied with every provision of this Code and it is now complying with the Code.

Mr. Hulett further states:

"At this point, your deponent desires to advise this Court that at no time, to his knowledge, has the said complainant nor the said David B. Spielman assented to the code. His statements in his affidavit to the effect that he has rigidly adhered to the provisions of the Code seem inconsistent with the fact that he failed to sign compliance with the Code."

The signing of a statement of compliance to the Code has never been a requirement of adherence to the provisions of any Code.

Mr. Hulett states that the complainant had ample opportunity to express his position at all trade hearings in respect to the Code. I submit that I attended practically all of these trade hearings in this area and when afforded an opportunity to speak, expressed the attitude of the complainant as above described.

Mr. Hulett seems to make much of the fact that one of the affidavits submitted on behalf of the complainant was executed by Edna Sperl Burke, of the Bushwick Decatur

Motors, Inc., who has been charged with two violations in [fol. 212] the Magistrates Court. I cannot see the relevancy of this fact to the issue at bar other than the fact that this Company has been victimized in the same manner as the complainant.

Mr. Hulett further states:

"Deponent has received no word from the said complainant, as Code Authority, of the 170 or 180 sales of automobiles which were lost by complainant and by him allegedly lost because the sales were subsequently consummated by other dealers at prices prohibited by Code regulations. It should be the duty of the complainant if he knows of such violations of the Code to report same to the Code Authority."

On the — day of ——, 1933, and on several occasions thereafter, the complainant mailed to the Motor Vehicle Retailing Code Administration, attention of Mr. J. B. Hulett, complaints of violations of the price provisions of this Code. Each one of these complaints represented lost sales. The details of each complaint were set forth and the names of the purchaser of the car and the address of the purchaser detailed. Specifically, the names and addresses of each such purchaser are as follows:

[fol. 213]

Name	Address	Purchased car from
Mr. Schors	c/o Gold Seal Button, Works, 416 Marcy Ave., Bklyn	Bates Chevrolet
H. Sternberg	4403 Avenue I, Bklyn	Prince Motors
Metro Woolen Co.	7 Washington Pl., N. Y. C.	
H. Q. Seidner	401 Bway., N. Y. C.	Brownsville Chev. Co.
Mr. Weinstein	c/o Dominion Dyeing Co., Inc., 81 Crosby St., N. Y. C.	Bates Chev.
Mr. Ladzin	308 Bedford Ave., Bklyn	
I. Abramovitz	96 Stanton St., N. Y. C.	
Hampar & Co. Inc.	69 Greene St., N. Y. C.	
G. Rubner	2101 Westbury Court, Bklyn	
Sidney Topal	1635 Atlantic Ave., Bklyn	Brownsville Chev. Co.

[fol. 214] In spite of the number of such violations and in spite of a conference had by myself with Mr. Hulett's assistant, Jacob Cross, no action of any kind was ever taken by the Administrator. Considerable time and effort was expended to secure the details of these complaints and when the complainant found that absolutely no action could be obtained from the Administrator, reporting of obvious complaints was completely abandoned. It is most difficult

to perceive how Mr. Hulett can state that he was not cognizant of such violations and the loss of sales on the part of the complainant.

Mr. Hulett further states:

"Your deponent denies the allegation of the said Spielman that his records indicated over 1200 complaints of violations in the Metropolitan Area of New York, but deponent did talk with said Spielman and estimated that number of complainants."

"Your deponent has, however, since checked the complaints made and finds that since October 3rd, 1933, there have been 964 complaints. A large percentage of these were unfounded, no violations having occurred. The dealers involved in proven cases are about 125, or about 8% of the total number of dealers in that our list of dealers, according to the records of the Secretary of State of New York, shows that there are 1559 dealers in the ten Counties under the jurisdiction of the Metropolitan New York State Advisory Committee, of which your deponent is the Commissioner."

[fol. 215] An admitted report of approximately 1,000 violations with 1,559 dealers certainly manifests widespread disregard for the price regulatory provisions of the Code of Fair Competition.

It is also reasonable to assume that reported violations of other dealers were handled in the same manner as that submitted by the complainant. It is further reasonable to assume that most dealers securing no action upon their reported complaints lost heart and abandoned the method of reporting complaints. If the experience of the complainant is typical of the other dealers in the Metropolitan Area of New York, it is reasonable to assume that more than 10,000 violations have actually occurred. This, if distributed between the dealers of this area, would represent 7 violations to each dealer. Further, we must take into consideration that most violations are never detected and consequently never reported. In light of such facts, it is reasonable to assume that compliance is rare and violations rife.

Mr. Hulett further states:

"Your deponent denies that he and/or his office has at any time used 'persuasion, then threats, then boycotts, then

intimidation,' as alleged by the said Spielman. As a matter of fact, the evidence in support of the pending proceeding under which the said Spielman is now in the Magistrates Court, was secured through the Association of which he is a member, as more specifically set forth in the affidavit of Ralph Ebbert, aforementioned."

It would be wise, at this time, to expose what might be [fol. 216] characterized by the "yellow press" as a "racket".

The Motor Vehicle Retailing Code Administration for the Metropolitan Area of New York, Mr. J. B. Hulett, Commissioner, has been administering the Retail Motor Vehicle Industry with an avowed demonstration of executive, judicial and legislative powers much akin to that of a sovereign power. Every means that could be devised by human ingenuity was used to cudgel members into this Association. As I have heretofore set forth, the simple attempt to get a copy of the guidebook was refused until considerable ado had been made because the applicant had refused to join the Association. The obvious object of this was to build up a bureaucratic device that would perpetuate the officers of the Association in their respective positions, availing them of substantial income for their efforts. The facts bear out these bold assertions. Mr. Hulett in his affidavit sets forth that there have been 125 proven violations of the Code of Fair Competition. I do not believe that more than ten of these have ever found their way into the Court. All of the others have been adjudicated by the Commissioner or his subordinates. Invariably the adjudication was a finding of "Guilty" and an imposition of a substantial fine. I have been informed that fines ranging from $50 to $500 have been imposed and collected. Of course these sums running to vast proportions have found their way into the coffers of the Association subject to the use of its officers.

An incident to which I was a party will clearly bear this [fol. 217] out. The very proceedings now in the Magistrates Court against the complainant was only instituted after a series of conferences with Mr. Hulett. On June 9th at 5:00 P. M., Mr. Hulett sent a letter addressed to me personally, requesting me to be in attendance at his office in New York at 11:00 A. M. Monday, June 11th. I re-

ceived this letter about 11:00 A. M., Monday, June 11th, and promptly communicated with Mr. Hulett. His secretary advised me that he was in conference and could not be disturbed but told me it was of vital importance to forthwith appear at the office because the complainant, Spielman Motor Sales Co. Inc. was in very "serious trouble". Though impressed with the attempt on the part of the secretary to fill me with awe and fear of an impending calamity, I finally begged off and secured leave to appear the following Thursday. On Thursday I was ushered into the presence of Mr. Hulett. Mr. Hulett advised me that a very serious violation had been secured against the Spielman Motor Sales Co. and that unless I would sign an agreement to be bound by the findings of a commission operating under this Motor Vehicle Retailing Code Administration, the matter would be subject to the Magistrates Court and a criminal prosecution commenced. I refused to sign and told him that I knew of no violations and that I was not going to be cudgeled into any agreement before any commission whose verdict always seemed to be "Guilty" with a substantial fine attached thereto.

Mr. Hulett then told me that he had an investigator with a dictaphone record of a violation by one of our salesmen. [fol. 218] He advised me that considerable effort had been made and that he had the absolute proof in the form of this dictaphone record. Mr. Hulett volunteered that I take a few days to investigate the matter but felt that it would be wise to keep the matter out of the courts. I did return to his office the following Saturday afternoon and told him that I had learned how he had endeavored to entrap one of my employes, and, in the vernacular, had veritably "framed" one of the salesmen. I then emphatically told Mr. Hulett, in rather strong language, that I would have no part of his Association or any Association that used such dastardly methods and practices.

I have cited this incident in detail to clearly demonstrate to this Court that this Association and its Commissioner has been using the Code and the N. I. R. A. as a vehicle for the advancement of their own pecuniary benefit. That they have performed the functions of both judge and jury alike. That they had used every means of deceit, device and trickery to establish a violation of the Code and then having established such "violation" brought the violator be-

fore their own composed Committee which fined the violator, the proceeds of which fine eventuated into the coffers of the Association.

Those high-handed practices of meting out punishment came to the attention and ears of Senator Nathan Straus, Administrator of the State of New York of the N. R. A. Mr. Hulett was severely censored and advised to abandon such methods.

[fol. 219] When Mr. Hulett states in his affidavit to this Court that he was not the moving factor in securing the threatened action on the part of the District Attorney in the proceedings in the Magistrates Court but that the same was done through a local Brooklyn Association of which the complainant is a member, I feel that such is nothing but a deliberate attempt to mislead this Court. Such action in the Magistrates Court followed promptly after I had been threatened with criminal proceedings by Mr. Hulett and is his own office and after I had strongly advised him that I would not submit to the judgment of a commission formed from his own Association.

These practices are known to virtually every member of the trade and have so instilled fear and dread of the wrath of the Commissioner and his Association that no intelligent or honest statement of true facts can be obtained from most of the members of the industry. I have spoken to more than 100 retail dealers in the Metropolitan Area of New York, and with one single exception, everyone has frankly expressed their thoughts that the price regulatory provisions of this Code of Fair Competition was absolutely unworkable and was creating serious prejudices to most of the members of the trade. They further expressed that if the Code were strictly enforced, its inequalities would so stagnate the retail automobile business as to cause sheer hardship and possible financial difficulties on the part of [fol. 220] most dealers. They frankly admitted that practically all dealers were violating the Code and that the only manner that they could continue to remain in business would be to violate. When I asked these dealers to place their expressions in the form of affidavits so as to submit it to this Court, with the exception of 10 dealers, all of the others frankly manifested fear of what might happen if the wrath of the Commissioner, Mr. Hulett, were incurred against them.

Similarly, I have been advised that the Commissioner has sent his emissaries to secure affidavits refuting the affidavits submitted on behalf of the complainant in this action; that though there are more than 750 dealers in this Metropolitan Area only 57 dealers were willing to execute affidavits. These affidavits for the most part contained rank falsehoods regarding the operation of the Code of Fair Competition in the Metropolitan Area. They have been executed in the fear that if they would refuse the Commissioner, they would be singled out in the same manner as the complainant has been.

Mr. Hulett further states in his affidavit:

"Your deponent denies that every sale of a new automobile by the complainant was pursued by your deponent of his office."

[fol. 221] "Deponent further denies that threats and intimidation were used against customers of the said Spielman who refused to answer questionnaires regarding their purchases.

"Your deponent as Code Commissioner has caused questionnaires to be sent in the regular course of checking on some sales of all dealers for the protection of the public, and it may be that some of these have been received by some of said Spielman's purchasers. These questionnaires are invariably sent by mail, so that the question of intimidation could not take place. In a small percentage of cases investigators are sent out to call on these purchasers, but they are all instructed by your deponent personally to ask for the information desired in a gentlemanly and courteous way, and if the information is refused to further advise his office."

It may be true that "every sale" was not pursued but it is quite certain that most sales were pursued by Mr. Hulett. There can be no doubt that Mr. Hulett singled out the complainant because of its aggressive expression of opinion about the effectiveness of the Code. In fact I have been informed by a special investigator that Mr. Hulett sought to employ him for the express and sole purpose of tracing down every one of the Spielman Motor Sales Co. contracts. This special investigator refused the employment because he felt such services would prejudice his pre-

vious business relations with the retail automobile dealers in this area. Annexed hereto is the affidavit of one Gabriel Cohen which sets forth in detail how he was abused and threatened with criminal prosecution because he refused to sign a statement concerning the details of one of his trades with the complainant. This certainly does manifest the type of tactics employed particularly directed toward the complainant.

[fol. 222] The most ludicrous statement in the entire affidavit is his statement that such investigation has been "for the protection of the public". No statement ever could have been further from the truth.

This benefactor of the public at large seems to be a sheep in wolf's clothing. In January of 1934, a special ruling was made by the Administrator compelling the fixation of an additional charge to every prospective purchaser of an automobile in the purchase of a low priced car in the sum of $28.50. This charge was for "handling charges". Practically every Chevrolet dealer in the Metropolitan Area of the City of New York petitioned Mr. Hulett to eliminate this charge because they felt it was an unfair burden upon the public. This petition fell upon deaf ears. I do not believe that one single act on behalf of the Administrator can be cited where the public secured any benefit therefrom. Nor is it obvious to me how the investigation on the part of the Administrator could possibly benefit the purchasing public.

In conclusion, I feel that if Mr. Hulett's affidavit is read, together with the facts I have endeavored to display relating to his decisions, there can be but one determination and that is that the Code of Fair Competition for the Motor Vehicle Retailing Trade can never operate with respect to its price regulation provisions because they are arbitrary, illfounded and unenforceable.

[fol. 223] Affidavit of Ralph Ebbert

The affidavit of Ralph Ebbert is entirely devoted to an elaboration of the fact that neither the complainant nor any of its officers have at any time ever expressed any dissatisfaction with the Code of Fair Competition for the Motor Vehicle Retailing Trade.

I know Mr. Ebbert intimately and I have an extremely high regard of the man's character and reputation. He is

holding the position of Manager of the Brooklyn Motor Vehicle Dealers Association and has been for fourteen years. His position would be severely jeopardized if he would express his personal sentiments contrary to the dictates of Mr. J. B. Hulett, Commissioner for the Motor Vehicle Retailing Trade for the Metropolitan Area of New York.

In light of the unfortunate position that Mr. Ebbert is placed in, it is not difficult to understand the expressions of fact contained in his affidavit.

Mr. Ebbert's memory seems to be rather short-lived.

He mentions two trade association meetings, one at the Hotel St. George and the other at the Garden City Hotel; both of which he remarks were never attended by any representative of the complainant corporation.

I attended the meeting at the Hotel St. George in Brooklyn on August 10, 1933. This was the largest gathering of Brooklyn automobile dealers I have ever attended. The [fol. 224] N. R. A. program had just reached the zenith of its emotional peak. The dissenter to any part or form of the program was met with the jeers and derisions of a traitor. The meeting was marked principally by the fiery enthusiasm and flag waving that was typical of that era. Enthusiastic resolutions without even calling for a vote of "Nay" were passed. I did not vote at that hearing nor was I afforded an opportunity to speak although frankly I did not endeavor to secure the floor. During the course of the meeting, pledges of compliance and endorsement of the Code of Fair Competition for the Motor Vehicle Retailing Trade were distributed throughout the meeting for signature. I refused to sign this compliance certificate and emphatically told everyone in attendance around me that I would not permit this unbridled, emotional outburst to have my endorsement, as a part of the National Recovery Program, price regulations in this Code of Fair Competition that would eventually be destined to failure. Mr. Ebbert knows these facts to be true.

I attended a meeting on behalf of the complainant corporation in the Hotel New Yorker on December 13, 1933. Mr. Ebbert attended this meeting as well as Mr. Harry G. Bragg, General Manager of the Automobile Merchants Association of New York, Inc., the local Manhattan association. At this meeting I was called upon to speak and I

very emphatically denounced the price regulation provisions of this Code of Fair Competition and introduced at this meeting a resolution. This resolution, in its recitation, stated:

[fol. 225] "Whereas, a meeting of all Chevrolet dealers operating under the Code of Fair Competition for the Motor Vehicle Retailing Trade in District #2 held at the New Yorker Hotel, a meeting on December 13, 1933; and

"Whereas, these dealers have surveyed the prices on Chevrolet used cars as quoted in the N. A. D. A. Code Book; and

"Whereas, they feel that these prices as arrived at have the tendency of reducing their sales and thus defeat the purposes of N. R. A. to increase wages and shorten hours; and

"Whereas, these prices put in the hands of competition sales arguments of depreciation that will hinder Chevrolet dealers new car sales; and

"Whereas, practically all the dealers at this meeting had returned to them actual reported sales of used cars that the N. A. D. A. refused to accept because they claimed these figures were inflated and thus refused to consider them in their compiling of a fair price for used Chevrolets and

"Whereas, the present used car Chevrolet prices will tend to slow up the tremendous replacement business which all dealers and car manufacturers are now trying to tap;

"Therefore, Be it Resolved that the President of this meeting is hereby empowered to appoint a committee of 5 whose duties it shall be to have presented to those powers that be that they take such steps to correct and rectify these present Chevrolet used car prices and publish such figures as will place Chevrolet in a fair comparative light with competitive cars of its price class."

This resolution modified was subsequently adopted by those in attendance at the meeting and I was appointed as one of the Committee of Five. Mr. Ebbert was in attendance at this meeting and it is hard to conceive that he should represent that no condemnation of the Code and its Fair Trade Practice provisions was ever made by a repre-

sentative of the complainant corporation. I have likewise [fol. 226] attended many other trade meetings principally of Chevrolet dealers and I have never missed the opportunity at such trade hearings to voice the position of the Spielman Motor Sales Co. Inc.

In the last few months, I have had occasion to speak to Mr. Ebbert in connection with the problems of the trade on four separate and distinct occasions. On each of these occasions I reiterated my position to Mr. Ebbert and discussed with him various phases of the problem. As a matter of fact, only so short a period as ten days ago, I communicated with Mr. Ebbert and asked him whether in light of this present application I would be welcome to attend a trade gathering in the Garden City Hotel in Garden City. He very jovially extended a hearty invitation as the result of which I attended this trade meeting. After the meeting had concluded, I again spoke to Mr. Ebbert and he at that time heartily expressed himself to the effect that he did not want this present litigation to disrupt his friendship with me and that there was considerable merit to much of my position.

Mr. Ebbert also states:

"That the Brooklyn and Long Island Automobile Dealers Association has no record of any letters sent in protest of the Code of Fair Competition for the Motor Vehicle Retailing Trade from the said complaint."

The Brooklyn and Long Island Automobile Dealers Association has no official standing of any kind whatsoever in the enforcement of the Code provisions and consequently would certainly not be the proper authority to address any letters of objection.

[fol. 227] In light of all these facts it is hard to reconcile the apparent impression of the affidavit that no objection at any time had been voiced by the complainant or its officers.

Affidavit of Hiram Bates Pope —

At the very outset, to truly evaluate this affidavit it is only fair to know the background of the affiant.

The years 1919 to 1923 I was engaged in the automobile supply business and from the year 1923 to the present time

I have been engaged in the sale of automobiles, all in the Metropolitan Area of the City of New York. During this period, I have joined many trade associations and fairly consistently attended all trade hearings. I have frequently visited the establishments of my competitors and have had frequent occasion to discuss business problems with them.

During this period of fifteen years, I have never heard of the magazine "Automobile Topics" with which the affiant, Hiram Bates Pope, is identified. I have never seen a single copy either in my establishment or the establishment of any other automobile dealer that I have visited.

I have never been solicited for a subscription either personally or by mail.

[fol. 228] I have never heard discussed by any person engaged in the trade any article or printed information contained in said trade organ.

Despite this, Mr. Pope characterizes his organ in the following language:

"A magazine known as "Automobile Topics" which is now considered as a trade authority in this industry."

Mr. Pope makes no mention of the extent of his circulation, the number of paid subscribers or the extent of his advertising. In fact the affidavit seems to be absolutely devoid of the size or his organ or of the effect it has on the industry.

The entire affidavit seems to be based upon a single survey made by him which he endeavors to impress this Court as typical of the entire industry.

A close study of the sources from which he has derived his information and the broadness of the inquiry will clearly disqualify it as befitting any consideration by this Court.

The questionnaire referred to by Mr. Pope has been sent out to 500 dealers. Mr. Pope characterizes these 500 dealers in the following language:

"That in an endeavor to determine conditions and more particularly on or about June 12, 1934, your deponent forwarded a questionnaire to 500 dealers distributed throughout the United States both as to territorial location and [fol. 229] representation with respect to the various makes of automobiles as set forth in Exhibit A attached hereto and made a part hereof.

"This distribution of dealer names was effected according to a system which has been used over the past ten years in an effort to secure representative opinions constituting in effect a cross-section of the dealer viewpoint for the country as a whole."

No mention of any kind is made by Mr. Pope as to how his system arrived at a strata of 500 dealers to represent approximately 45,000 dealers throughout the nation. His own admitted results clearly display that his questionnaire could never have been sent to a true cross-section of dealers.

The reasons are quite obvious. 353 replies were received, of which 268 or 76% were received from cities and towns of less than fifty thousand population. 85 or approximately 24% were received from communities of more than fifty thousand in population. Inasmuch as more than 85% of all automobiles sold are sold in communities of over 50,000 in population, we find that 24% of the responses come from areas representing 65% of the sales. How this can be said to be a true cross-section of the dealer viewpoint of the country in light of such facts is hard to conceive.

If 85 responses were received from metropolitan areas of over 50,000 where approximately 30,000 dealers are engaged, it is most difficult to conceive how the reaction and response of approximately ¼ of 1% of these dealers could truly affect the sentiment and reaction of all such dealers. [fol. 230] In light of the fact that the survey is obtained from such an infinitesimal portion of all dealers, the observations made should be completely disregarded by this Court.

The survey made by Mr. Pope cannot conceal, however, that approximately four out of five of every responding dealer to his survey clamor for enforcement of the Code, setting forth that there was not sufficient enforcement. Certainly this demonstrates that compliance is the exception and violation the rule.

In the closing portion of Mr. Pope's affidavit, he states:

"The tabulation shows that for the first six months of 1932, a total of six hundred sixty-three thousand, six hundred and twenty-five (663,625) registrations of new cars were made; that in the first six months of 1933 there were

six hundred eighty-two thousand, three hundred and sixty-seven (682,367) registrations of new cars made. For the first six months of 1934 there have been nine hundred ninety-five thousand, one hundred and twenty-one (995,121) registrations of new cars made. This substantially shows that the retailing business of this industry has advanced by leaps and bounds since the Code was adopted."

Mr. Pope rests his case on the mere statement of these statistics and would have this Court believe that the enormous advance from 682,367 registrations of 1933 to 995,121 registrations in 1934 has been caused entirely by the Code of Fair Competition for the Motor Vehicle Retailing *Code.* [fol. 231] Nothing in fact could be more removed from the truth. I will clearly demonstrate to this Court that if no Code of Fair Competition for the Motor Vehicle Retailing Trade had ever existed, the advance in the sales of new automobiles would have been as great or considerably greater than that demonstrated by these figures. To prove the truth of this latter statement, we must understand the background of the automobile industry.

The great consuming American public has in the past ten years consumed approximately four millions of automobiles every year. The statistics published by the National Automobile Chamber of Commerce indicate the following production of motor vehicles for the past ten years.

Year	Total Motor Vehicles Produced
1922	2,646,229
1923	4,180,450
1924	3,737,786
1925	4,427,800
1926	4,505,661
1927	3,580,380
1928	4,601,141
1929	5,621,715
1930	3,510,178
1931	2,472,359
	39,263,699

For the ten year period, including the years from 1922 to 1931 inclusive, approximately forty million cars have been produced or an average of approximately four million cars

a year. It is a conceded fact that more than 60% of all cars sold are sold in the first six months of the year. In other words, the normal consumption by the purchasing American public for the first six months of the year would [fol. 232] be approximately 2,400,000 cars.

The figures cited by Mr. Pope clearly demonstrate the complete paralysis of the wheels of industry and the purchasing power of the American public with respect to items other than the bare necessities of life resulting from the economic depression that we are presently in. The first six months of the year 1932 was approximately 26% of normal production. The first six months of the year 1933 was approximately 29% of normal production. The first six months of the year 1934 was approximately 41% of normal production. While it is true that the improvement from the year 1933 to 1934 was exceptional, the industry by no means has returned to normalcy. This increase can be directly attributable to the general improvement in specific parts of the country through the upward trend or movement of business by the Recovery Program of the President of the United States. We find that in the badly stricken areas of the South and Southwest where the Government saw fit to expend either through the forms of loans or other governmental ventures vast sums of money, enormous improvement was reported in the sale of new cars. On the other hand in the large metropolitan areas where little relief in proportion to other parts of the country was afforded, new car sales have not fared as well. The best illustration of this is the Metropolitan Area of the City of New York.

Sherlock & Arnold, Inc., recognized publishers of automobile statistics report that the first seven months sales in the respective years, 1932, 1933 and 1934 for the Metro- [fol. 233] politan Area of the City of New York is as follows:

1932	63,170
1933	66,915
1934	66,445

The complainant seeks redress in this court because of this experience in the operation of the Code in the Metropolitan Area of the City of New York and what is more significant of the true operation of the Code in this area

than the fact that registrations in this area have fallen off 470 cars over that of the year 1933. It is most significant to note despite the tremendous improvement of industrial conditions throughout the nation, despite the general improvement in the sale of new cars throughout the nation of approximately 40%, new car sales in this area with the operation of the Code have fallen.

Another very logical development of this situation can be readily understood.

In periods of dire distress such as we have experienced in the years 1932 and 1933, the public had confined their purchases mainly to the bare necessities of life such as food, shelter and clothing. Articles of convenience such as automobiles, radios, pianos, etc., are purchased with extreme caution and in most instances, in cases of necessity only. Consequently such articles sustain the greatest loss of trade. However, automobiles do not last forever and an abnormally low sales for years indicate that the bulk of the automobiles on the streets are many years old [fol. 234] and for the most part in dilapidated conditions. Automobiles in the last decade have rapidly begun to fill a need bordering on necessity. This is so true that after a nation has abstained from purchasing to the degree that this country has for the last two years and made their old automobiles serve their purposes, the first improvement of industrial activity would naturally bring forth a substantial improvement in the sales of automobiles.

Consequently if no Motor Vehicle Retailing Code had ever been promulgated, the year 1934 and the year 1935 would have enjoyed a considerable improvement over the abnormally low years of 1932 and 1933.

As a matter of fact it is the contention of the complainant that if the Motor Vehicle Retailing Code had never been promulgated, considerably more new cars would have been sold because the objectionable feature of the price regulating provisions of the Motor Vehicle Retailing Code have seriously retarded the sale of new cars. This can be easily seen when we consider that a prospective purchaser of a new car who offers his used car in trade finds that he cannot secure a true and honest value for his automobile because of the arbitrary "average method" used in fixing maximum used car allowances and as a result, he abstains from purchasing. If this restraint did not exist

and every prospective purchaser would be able to get a true and honest and fair value for his trade-in, he would undoubtedly be more disposed to purchase.

[fol. 235] Therefore the Code of Fair Competition for the Motor Vehicle Retailing Trade has seriously impeded the sale of new cars.

With respect to the City of New York, it is most amazing to realize that in the year of 1933 fraught with the most serious problems of financial distress, bank closings, enormous number of failures, more cars were sold than in the much improved year of 1934. Something must be responsible for this peculiar reversal of natural trends. I maintain that the Motor Vehicle Retailing Code is more responsible for this condition than any other factor.

In conclusion, I believe it is quite obvious that the Motor Vehicle Retailing Code has lent no aid to the improvement in the sale of new automobiles either in the entire United States at large or the Metropolitan Area in the City of New York.

[fol. 236] Affidavit of Oscar P. Pearson

The entire affidavit of Mr. Pearson is devoted to establishing the fact that there has been a substantial increase in the production and sales of new automobiles in the first months of the year 1934. The facts and arguments set forth in detail with reference to the affidavit of Hiram Bates Post logically apply to this affidavit.

Mr. Pearson recognized that in submitting the affidavit in behalf of the defendant he created a wrong impression that the increase in sales was due primarily or partially through the operation of the Code of Fair Competition for the Motor Vehicle Retailing *Code.*

In a letter addressed by Mr. Pearson to myself dated August 21, 1934, in response to the question "Do you feel that volume of new car sales involving trades of cars manufactured prior to 1932 would have increased without dealers' code?" he responded:

"We do not know that a recovery in general business retail sales would undoubtedly have shown increases even without a dealers' code."

In order to clearly establish that the Code of Fair Competition for the Motor Vehicle Retailing Trade in no way

contributed towards the increase of new automobiles in the first six months of the year 1934, I sent the following tele- [fol. 237] gram to practically every manufacturer of a new automobile:

"In connection with our suit to test the validity of retail automobile dealers code Oscar P. Pearson of your National Automobile Chamber of Commerce submitted affidavit containing comparative sales figures tending to show recovery in the automobile business due to dealers code. In order to clarify situation would appreciate receiving answers to following questions:

(1) Do these figures contain truck sales not affected by Code?

(2) What percentage of increased business do you attribute to spending of government funds in distressed areas of south and southwest?

(3) Do you attribute increase in new car sales to dealers code?

(4) Do you feel that volume of new car sales involving trades of cars manufactured prior to 1932 would have increased without dealers code?

(5) In your opinion does guide book retard sales of high priced automobiles?

(6) Where your dealers volume has been in excess of 1933 has net profit in most cases increased proportionately?

(7) Have your dealers in proportion to their new car sales a smaller average used car stock in 1934 as compared with 1933?

Any additional comments will be greatly appreciated. Please wire via Postal Telegraph night letter collect.

Spielman Motor Sales Co., Inc."

This telegram was sent but two days ago but three responses have been secured. I believe upon the submission [fol. 238] of this affidavit several additional responses will be had.

The following responses were received:

Auburn, Ind., Aug. 21.

"Your telegram will be placed before the President of our Company upon his return to the factory.

Auburn Auto Co."

"Lansing, Mich., Aug. 21.

"We regret lack of time and study do not permit us to answer all of your questions but we do most emphatically think that guide book has retarded sale of higher priced automobiles.

Reo D. Bates, President."

"August 21, 1934.

(Letter)

"Mr. David Spielman,
Speilman Motor Sales Co., Inc.,
220 Greenpoint Avenue,
Brooklyn, N. Y.

DEAR MR. SPIELMAN:

In the absence of Mr. Reeves your telegram of August 21st has been referred to the writer for a reply.

I shall answer the questions in the order in which they were put:

1. Do these figures contain truck sales not affected by code?

Answer to No. 1: Yes, the retail sales figures compiled by us each month contain retail sales of trucks with a capacity greater than ¾ ton.

2. What percentage of increase in business do you attribute to spending of government funds in distressed areas of south and southwest?

Answer to No. 2: We have no data on this point, but undoubtedly a large proportion of new car sales were made [fol. 239] as a result of government funds distributed to the distressed areas.

3. Do you attribute increase in new car sales to dealers code?

Answer to No. 3: No. We compile monthly retail sales totals as a matter of information for our members. We do not place any interpretation on them, nor do we ascribe the increases shown as being due to any particular cause.

4. Do you feel that volume of new car sales involving trades of cars manufactured prior to 1932 would have increased without dealers code?

Answer to No. 4: We do not know. With a recovery in general business retail sales would undoubtedly have shown increases even without a dealers code.

5. In your opinion does guide book retard sales of higher price automobile?

Answer to No. 5: I am not qualified to express an opinion on this question.

6. Where your dealers volume has been in excess of 1933 has net profits in most cases increased proportionately?

Answer to No. 6: We have not made a study of dealers' net profits, and, hence, do not know.

7. Have your dealers in proportion to their new car sales had a smaller average used car stock in July 1934 compared with July 1933?

Answer to No. 7: We do not compile figures on used car stocks for the entire industry. However, we receive reports on used car sales as well as new car sales by the dealers of a number of manufacturers. During the first six months of 1933 there were sold by this group of dealers 154 used cars for every 100 new cars. During the first six months of 1934 used cars were sold by this same group in the amount of 146 for every 100 new passenger cars.

If there are any further questions we shall be glad to [fol. 240] give any factual data we have available.

Very truly yours, National Automobile Chamber of Commerce. (Signed) S. P. Pearson, Manager, Statistical Department."

Alvin MaCauley, President of the Packard Motor Car Company and also President of the National Automobile Chamber of Commerce, in his report to his stockholders as of July 1, 1934 stated:

"The operations of the Motor Vehicle Retailing Code, which, as enacted, may work to the advantage of lower priced cars but certainly operates to the great disadvantage of all high priced cars."

One thing is certain. The sale of high priced cars has very seriously been retarded by the arbitrary fixing of low maximum prices for trade in used car allowances.

The trade in principles of the Code of Fair Competition

with respect to high priced cars is brutally unfair. A purchaser of a Packard in 1929 paying therefor almost $5,000, expecting to use the automobile for at least five years, would find that he could receive for his automobile in trade in the year 1934 for another Packard of equal value but $380. Cars of this character are usually maintained in excellent condition by experienced chauffeurs so that the automobile at the elapse of five years is still comparatively in good condition. To expect the purchaser of a new $5,000 Packard to receive the same trade in allowance for his 1929 Packard as he would receive if he were to purchase a $700 Ford is ridiculously unsound. The dealer's margin of gross profit on high-priced cars invariably runs considerably greater than the margin of a dealer [fol. 241] on a low priced car. The average Packard dealer receives approximately 28% of the factory list price as his margin of profit while approximately 22% is received by a Ford dealer. On a $5,000 car, the 6% difference would represent approximately $300. If the Packard dealer could offer this $300 to the prospective purchaser, he would undoubtedly be able to consummate a greater number of sales and retain for himself a profit of approximately $1,100 upon such sale. The purchaser who is offered about 7% of the original price paid for his automobile feels indignant and either purchases a lower priced car or in most instances contents himself with a further use of his old automobile. Such rigid policies with resulting inequities must retard sales, must retard employment, and must delay the recovery program.

It is to be particularly noted that the sharp increase in the volume of new car sales in the months of June and July has been caused by two factors (1) manufacturers of low priced automobiles drastically reduced the prices of their cars and (2) flagrant violations of the Motor Vehicle Retail Code throughout the nation removed for the most part the retarding effect of the price regulation provisions of the said Code.

As the time progressed since the inception of the Code, more and more dealers felt the sharp pinch caused by the arbitrary provisions of price regulation in the Motor Vehicle Retailing Code. As their problems became acute, more and more dealers commenced to violate so as to retain their volume of new car sales. The result has been

[fol. 242] almost a complete collapse of compliance with the price regulation provisions of this Motor Vehicle Retailing Code so that for the most part these provisions are totally ignored and the natural restraint originally had by such provisions have almost been totally abolished by such wide-open and flagrant violations.

[fol. 243] Affidavit of Harold H. Straus

There is one point that requires refutation in this affidavit. The question at issue in this present application at bar is the price regulations of the Code of Fair Competition for the Motor Vehicle Retailing Trade. These price regulations are determined thru the fixation of maximum prices on used car trade-in allowances and thru arbitrary fixation of prices for the sale of new cars. One is equivalent to the other. Both are necessary in most instances to require a complete regulation of price, on the sale of a new car because more than 85% of all sales contemplate trade-ins. While the Magistrates Court proceedings contemplate a situation involving a discount, there is pending at the present time in the office of Mr. Hulett two situations upon which there is threatened action against the complainant contemplating used car trade-in allowances. The problem and question is one and the same and the attempt on the part of Mr. Straus to draw this distinction is to avoid the issue.

Of course I, as the President of the complainant corporation emphatically deny the truth of the accusation made in the Magistrates Court proceedings against the complainant.

[fol. 244] Form Affidavits Submitted by Fifty-Seven Dealers

The defendant has submitted affidavits by 57 dealers to establish that the operation of the Code has been preeminently successful.

Inasmuch as all of the affidavits are identical, it would be wise to discuss and treat with these affidavits as one.

Analysis of Who Signed These Identical Affidavits

The controversy at bar essentially affects the Motor Vehicle Retailing Trade in the City of New York. There are

approximately 750 dealers engaged in the Greater City of New York in the sale of new motor vehicles. It is most significant to note that only 25 of the 57 affidavits submitted have been executed by dealers engaged in the Greater City of New York. It is certainly difficult to reconcile that the Administrator, Mr. J. B. Hulett, who has made strenuous efforts to secure the execution of as many affidavits as is possible in this area would have been successful in only 25 instances out of approximately 750 in securing affidavits that characterize so delightfully the results from the operation of the Code of Fair Competition. Think of it—25 out of 750—about 3% of the dealers engaged in this Greater City of New York.

I do not desire to cast any reflection upon the method employed to secure these affidavits. I have personally [fol. 245] spoken to more than 100 dealers engaged in this City of New York and with but a single exception everyone has condemned the operation of the Code, its inequalities and the impossibility of its further enforcement. As a matter of fact, three of the dealers who have signed this form of affidavit on behalf of the defendant emphatically told me that the Code had drastically failed of its purpose; that compliance was rare; and that the strict adherence to the Code as was the case at the time of its original inception had seriously impaired the sales of their automobiles. These very dealers who so very effusively condemned the Code did not hesitate to sign the form affidavit. These three men had no cause to distort the truth in their discussion of the matter with me but it is quite certain that there was a very definite inducement for their execution of the affidavit on behalf of the Commissioner, Mr. J. B. Hulett.

I. Koepel of E. Koepel, Inc. told me emphatically that all the dealers realized that the code was an absolute failure but that only a fool would "stick his head out" and incur the enmity and wrath of the Commissioner, Mr. J. B. Hulett. He advised me to do what all other dealers are doing and that is to carefully offer discounts and rebates to prospective customers who would not report such violations. This man did not hesitate to sign the form affidavit.

Stephen Bayers of Bayers Chevrolet Co., advised me personally that he felt the Code operation was a failure. He also told me that being a hero might cost a good deal; that I was a fool to subject myself to the possibilities this pres-

[fol. 246] ent litigation entailed. He also advised me that it was wise to play along with the times although he was absolutely convinced the entire Code would be abandoned shortly. He advised the logical thing would be to cry in terms of supporting the Code but to actually conduct the business on the basis where no "chiseler" would derive any sales from his customer. In other words, he frankly advised me to assume a two-faced role, i. e., lauding the Code while simultaneously violating to retain business.

Thomas Drago of the Mutual Motor Sales, Inc., so short a period as three weeks ago, advised me that the contention made on behalf of the complainant was absolutely correct and he would voluntarily execute an affidavit on behalf of the complainant if he could secure the consent of one Theodore Southworth, the dealer through whom the Mutual Motor Sales, Inc. purchased their Pontiac automobiles. Apparently Mr. Drago has very seriously changed his opinion in a very short time.

All three of these men frankly admitted that they were in apprehension of the Commissioner, Mr. Hulett, because of his practices and methods and that they would not like to do anything that would incur his displeasure and consequently incur his abuse.

Another affidavit is executed by one L. F. Jacord of L. F. Jacord & Co., a used car dealer. Used car dealers are not at all affected by the price regulation of the Code of Fair Competition. There is no restriction of any kind upon what price a used car may be sold. Even in instances where a [fol. 247] used car is traded in in the purchase of another used car, the dealer may allow any price for the trade in by simply varying the price of the sale of the second used car. While theoretically the used car dealer is bound by the trade in prices, in practical effect no such restriction exists. Of course such a dealer has had no experience with the changes of price regulation upon his business. Four other New York City dealers are engaged in the sale of high priced cars. If their experience is the experience of all other dealers then their experience, in the expression of Alvin Macauley, President of the Packard Motor Car Company, must be expressed:

"The operations of the Motor Vehicle Retailing Code, which, as enacted, may work to the advantage of lower

priced cars but certainly operates to the great disadvantage of all high priced cars."

W. E. Tarr, representing the New York retail branch of the Studebaker Sales Corporation of America which is a factory branch of the Studebaker Corporation signed this form affidavit. We have been reliably informed that this does not truly represent the opinion of the Studebaker Corporation and that the execution of this affidavit was done on his own behalf and represents his opinion exclusively.

It is not difficult to realize the circumstances under which most of these affidavits were secured. I do not believe that there are ten dealers in all of the 750 dealers in the Greater City of New York that are not in fear of the Commissioner, J. B. Hulett, and his practices and methods. A request of Mr. Hulett or from his office is tantamount to an order. The [fol. 248] execution of these affidavits may well be explained by the fact that the ones who signed did so irrespective of the true facts to ingratiate themselves into the favor of the Commissioner, J. B. Hulett. I have been informed by a Ford dealer engaged in the City of New York that a representative of Mr. Hulett's office called at the showroom of the Ford dealer, pressed the simple question "Are you in favor of the Code" and after securing an affirmative answer (which was the only answer to be given to a representative of Mr. Hulett's office) was asked to sign the affidavit without even reading the affidavit. Mr. Hulett's representative then advised the Ford dealer that he had more than 50 stops to make to secure the execution of 50 similar affidavits. Certainly such methods of not even affording the signer of the affidavit an opportunity of even reading its contents cannot be said to be a true reflection of the operation of the Code and the conditions resulting therefrom.

Of the affidavits secured from dealers operating outside of the Metropolitan Area of New York, fourteen operate garages as their principal source of income. The agency for the sale of new cars constitutes but an incident to their business from which they derive their livelihood. The volume of business derived by such dealers constitutes so small and minute a portion of all business done in their respective communities that their opinions should be greatly discounted.

[fol. 249] Analysis of the Contents of the Affidavit

The form affidavit, has been signed by 57 dealers, is the product of one man who has endeavored to display to this Court the Utopian results of the operation of the Code of Fair Competition for the Motor Vehicle Retailing trade. The conclusions are extreme and unquestionably biased. The fact that not one of the 57 signers varied or altered a single word with respect to the contents of the affidavit should clearly evince the fact that such signers would have been disposed to sign *any* affidavit if it would have served the purpose of the defendant and, incidentally, J. B. Hulett.

The affidavit, after the preliminary statement of name of the affiant, his address, the business with which he is affiliated, the car agency that such business retained, number of years engaged in such business, continues with a discussion of the operation of the Code. The affidavit states:

"That he is familiar with the conditions prevailing in the industry prior to and since the approval and operation of the Code of Fair Competition for the Motor Vehicle Retailing Trade."

"That deponent has a substantial investment in the automobile business.

"That despite the fact that enforcement of the code regulations has not yet reached the degree of efficiency, conditions in the motor vehicle retailing trade have, in deponent's opinion, improved since the approval and operation of the Code in that 'cut-throat competition has been eliminated.'"

[fol. 250] A frank admission was made that the Code was not being duly enforced. The statement that cut-throat competition was being eliminated is absolutely without foundation. As a matter of fact, upon the inception of the Code, practically every dealer, including the complainant, though their opinion of the Fair Trade Practices were similar to that of the complainant, afforded the operation of the Code a fair opportunity. At that time compliance was almost complete. At that time such complete compliance caused such a complete retarding of sales that those dealers that would have been unable to stand the financial stress of loss of business were compelled, through urge of financial necessity, to cheat. As a matter of fact, there is more open

violation of the Code today than at any time before. Though there is flagrant violation of the Code provisions, cut-throat competition does not for the most part exist. Most dealers, in recent years, because of the lack of new business, have become extremely cautious trade ins and while transactions are completed with smaller margins of profit than in more prosperous years, it is unusual for a dealer to sustain a loss upon a transaction. While it is true that the Code of Fair Competition ensures abnormally high profits under certain circumstances to the dealer in the operation of the Code the dealer stands to sustain great losses because the number of sales is greatly reduced. While the Code, if enforced, might eliminate a good deal of cut-throat competition, it would just as effectually put most dealers out of business because it would discourage a vast number of new sales, the profit of which is necessary if dealers are to remain in business.

This Code of Fair Competition, however, does not prevent [fol. 251] cut-throat competition in most instances. Because the Code discourages many sales, the desire for most dealers to compete sales is extremely great, the result of this being that most dealers, irrespective of the condition of an automobile to be used as a trade in, will allow the maximum price under the Code provisions for such trade in. Frequently, the true value of such trade in is so much less than such maximum allowance that a severe loss is occasioned to the dealer. Many dealers have told me that the bulk of buyers of new cars, before even displaying the car they seek to trade in, demand the maximum allowed under the Guide Book of this Code of Fair Competition. Such circumstances expressly within the provisions of the Code of Fair Competition stimulate rather than retard cut-throat competition. The maximum allowance distinctly tends to become the minimum allowance under such Code operations.

The affidavit then proceeds to state that the Code is effectual because:

"(2) Deponent's firm's business is in a healthier condition."

While the pecular benefits pertaining to the business of each of the affiants is not known to me, most of the dealers that

I have spoken to have lamented the fact that his business has not improved sufficiently to warrant an improvement in the financial status of their respective affairs.

[fol. 252] The statistics of Sherlock & Arnold, Inc., recognized publisher of facts and statistics on the motor vehicle industry, indicate that there has been less automobiles sold in the metropolitan area of the City of New York in the first six months of 1934 than in the first six months of the year 1933. We all concede the year 1933 was a difficult one. It is hard to reconcile a substantial improvement of the financial condition of the dealers engaged in the metropolitan area of the City of New York in the year 1934 over that of the year 1933. These facts, taken in light of the fact that there is a considerably greater number of dealers in the metropolitan area of New York in the year 1934 than in the year 1933, due to the expansion program of most of the large manufacturers of automobiles, would clearly indicate that with the reduced volume of business to be spread over a greater number of dealers, financial distress should become more evident.

The affidavit continues to state that the Code of Fair Competition for the Motor Vehicle Retailing Trade has been responsible for

"3. Deponent's firm is employing more people than it did prior to the Code and its payroll shows a substantial increase.

"4. Working conditions such as hours of labor have improved."

There can be no question but that adherence to the President's recovery program would have occasioned an increase in employment and a reduction in the hours of each employee. The Motor Vehicle Retailing Code is not responsible for this because such a condition existed upon the signing of the President's re-employment agreement more commonly known as the "Blanket Code." The objection to the Code lies entirely to its price regulation provisions, well [fol. 253] as complied with, the labor provisions of this code.

The affidavit continues to state that the code is responsible for

"5. Purchasers are now getting fair values for their used cars in trade and greater values in the new cars they buy."

I have at great length indicated that the Code has very seriously retarded new car sales because of the inequity resulting to purchasers of new cars seeking to trade in old cars worth more than the average would be under the Code. It is not necessary at this time to discuss this at greater length, but in passing it should be clearly indicated that the public by the very intention of the drafters of the code were to receive the least benefit, in fact deprived of the true value of their property.

The affidavit makes much of the fact that prospective purchasers get greater values in new cars they buy. The Code is in no way responsible for this. Factory prices are established by manufacturers who are not in any way bound or affected by the Motor Vehicle Retailing Code.

The affidavit further states that the Code is responsible for

"6. Dealers are prevented from selling new cars at below cost by not being permitted to allow a customer more than the fair value of a customer's used car traded-in."

It is quite certain that the fair trade practice provisions that regulate the prices to be allowed on trade-in if enforced would prevent any dealer, in most instances, from allowing an excessive amount for trade-in, but it does permit the dealer to make a high exorbitant profit by complying with the provisions of the Code. The provision was designed to yield the dealer exorbitant profits, but unfortunately resulted in retarding an enormous amount of sales, [fol. 254] and consequent losses of profits to dealers.

The affidavit further provides that the Code is responsible for

"7. The inflation of list prices of new cars to provide for an over-allowance on used cars taken in trade is being eliminated, thus placing competition on the basis of intrinsic value rather than used car allowance to the benefit of all concerned.

"8. Deponent because of the Official Used Car Guide Book has suffered less losses than at any time prior to the approval of the said Code in the trade-in and sale of used cars."

Non-compliance is prevalent, and there is hardly a dealer that has not in some instances allowed discounts or trade-in

allowance in excess of Code provisions. The manner in which this violation of the Code was effected was in most instances through the inflation of expense items. The prospective purchaser was usually induced to deliver a check in full payment of his purchase and received cash as a discount from the dealer. The dealer thereupon "padded" his respective expense accounts to absorb this cash outlay. I am absolutely convinced that if an analysis be made of the books of the 57 affiants and a study made of the expense accounts in comparison with the same accounts as of last year, an enormous increase will be noted in most accounts. Compliance cannot be had because the Code is fundamentally and economically unsound, because it does not permit the prospective purchaser, in many instances, to receive a fair value for his trade-in. While isolated instances of purchase and sale may occasion unusual profit to a dealer, by and large his business as a whole has seriously suffered by the Code operation.

The affidavit then proceeds to state:

"The suspension of this Code and especially of its cost protection features, in the form of an injunction by this Court, would immediately throw all dealers into vicious [fol. 255] cut-throat competition more brutal than ever before that could only result in the complete destruction of all the recovery gains that have been accomplished since the enactment of this Code."

There can be no question but that violation today is more common than compliance. John B. Hulett in his own affidavit admits of receiving approximately 1,000 violations. It is therefore reasonable to assume that the Motor Vehicle Retailing Trade in the metropolitan area of New York is not operating under the price regulation provisions of the Code but is today operating in spite of such provisions. With these provisions utterly disregarded, we find no such havoc that is depicted in this paragraph of the affidavit. As a matter of fact, sales in the months of July and August have run considerably ahead of the year 1933. We believe that the drafter of this affidavit endeavored to create a "bugaboo", so as to instill fear into this Court of severe and drastic consequences in allowing the relief sought by the complainant. Such fears are truly without ground.

In conclusion, we feel that the character of those signing the affidavits, the manner in which the signatures to those affidavits were secured, the extreme statements admittedly unsound made therein, so taint the tone and character of the affidavits as to merit no consideration by this Court in a determination of the issues at bar.

Analysis of Affidavit of K. J. Ammerman

K. J. Ammerman acted as Deputy Administrator in administering the Code of Fair Competition for the Motor Vehicle Retailing Trade from October 1, 1933 until July 26, 1934. Briefly, the progress of code administration, as the government's representative, has been entirely the responsibility of Mr. Ammerman. While I do not question [fol. 256] his integrity, it is only logical to assume that he would endeavor to support the justification of the Code and its provisions that he has administered for so long a period.

An analysis of his affidavit, however, discloses that he is an extreme enthusiast, tending to grossly exaggerate conclusions that do not normally fall from the facts at his command.

This can be simply illustrated by the extravagant language he employs. At the outset of his affidavit, he endeavors to depict the conditions that existed immediately prior to the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade. His language states:

"When the trade was backed to the wall; when the members of the industry were faced with bankruptcy, the employees faced with loss of their jobs and the remaining few with a reduction in pay; when revolt was in its ranks; when the industry's standards were repudiated by those who entered the trade during this critical period and were not alone satisfied to conduct their own business illegitimately but invited others to participate and rally under its folds, and by standing together in dishonor, supporting each other in perpetrating a shame which was too much to face alone; when normal credit operations were dissipated; when the economic consequences were never considered in 'putting over a deal'; when profits were forgotten to attain volume; when every attempt to stem the tide of financial ruin prove disastrous and when voluntary sacrifices of a few were to no avail—the members of this industry turned to

the Federal Government for aid and assisted in preparing a program for recovery."

This statement of conditions, immediately preceding the adoption of the Code, is absolutely without fact. The automotive industry and the retail dealers had enjoyed a sharp improvement over the preceding year for five months prior to the adoption of the Code. Their fare had been substantially improved and the upward movement in the sale of new automobiles was very definitely established. This can best be established by the statistics of the National Auto- [fol. 257] mobile Chamber of Commerce of new passenger car and truck registrations for the months of the year 1932 compared to the months of the year 1933 immediately preceding the adoption of the Code.

Month	1932	1933
May	149,978	181,167
June	166,628	197,444
July	118,919	216,302
August	108,538	207,460
September	96,860	189,245

It is to be particularly noted that the two months immediately preceding the adoption of the code, the new cars sold in those respective months was approximately twice the number of cars sold in the corresponding months in the preceding year 1932. How Mr. Ammerman could conceivably picture the situation in the light that he has, in the face of these facts and statistics, is very hard to conceive. We believe that he has been misled rather than that he is desirous of misleading this Court.

It is also very interesting to note the rather rash statements of improvements affected by the Code in the language of Mr. Ammerman. Mr. Ammerman, referring to the effect of the operation of the Code, states:

"They (dealers) have been operating under its provisions, and with increased volume of sales are now realizing profit on capital investment. Bankruptcy has been decreased; failures are practically unheard of; nearly every unemployed member of that trade has been re-employed; vacant stores have been re-occupied; credit has been established, and in general the entire aspect is one of a glorious future."

When even the most rabid proponent of the Fair Trade Practice provisions of this code admits that there is a large [fol. 258] number of violators and that observance of the Code is not entirely complete, it is difficult to further understand Mr. Ammerman when he attributes such glorious results from the operation of this Code.

Those two simple quotations should manifest the tone of the deductions made by Mr. Ammerman throughout the course of his affidavit.

Permit me to point out some of the improper deductions and conclusions made by Mr. Ammerman.

Mr. Ammerman refers to the automobile as a "necessity." While it is true that the use of the automobile has become a very distinct phase of the social and economic life of most of the people of the United States, the greater portion of the use of the automobile is still for pleasure purposes and as such it still borders on the luxury class, in most instances. This is particularly true when it is realized that all commercial vehicles over three-quarters of a ton capacity are not subject to the price regulatory provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade. Consequently the bulk of commercial vehicles (only 27.6% of commercial vehicles are of three-quarter ton capacity and less) are not affected by price regulation.

This fact can be clearly demonstrated when we find that in the years 1932 and 1933, the purchase of new automobiles dropped to 25% and 29% respectively of the normal consumption of four million cars per year. This normal consumption of four million cars per year is based upon an average of the ten-year period from 1922 to 1931 inclusive. Mr. Ammerman seems to ignore the fact that in any economic depression, articles that are anything but absolute necessities of life feel the greatest effect of the depression. [fol. 259] This fact alone is responsible for the sharp decrease in the purchase of automobiles in the years 1932 and 1933. His statement, extreme as it is, is as follows:

"Their (consumer) demand was for a lower priced car and whenever a used car was traded in on the purchase of a new motor vehicle, the consumer usually demanded an amount in excess of the actual value of the used car he owned. Believing as many dealers did, a volume of business would increase their profits, they acceded to the de-

mand of the general public and in their desire to complete a sale of a new motor vehicle very often granted an allowance on an old car which was far in excess of its true value and when re-sold by them they of necessity took a heavy loss. These competitive abuses continued until approximately 90% of the automobile dealers in the United States were either bankrupt or in such a financial condition that the period of their active business life would not exceed more than five or six months."

If the competitive abuses were so frequent as Mr. Ammerman will have the Court understand, it is difficult to conceive that any dealer would have been able to remain in business the two years (1932 and 1933) when the general demand for new automobiles fell to approximately 25% and 29% respectively of normal demand. If the dealers did not maintain a fair margin of profit on the small number of cars that they sold, they would have had to rapidly close their doors. The automotive industry sustained no greater loss nor recorded no greater bankruptcy record than the average industry throughout the entire nation.

The rash statement by Mr. Ammerman that the dealers had been subjected to such abuses that 90% were bankrupt and that few could remain in business more than five or six months, seems absolutely ridiculous. He does not state when their condition arrived at that point and particularly avoids reference to the fact that the extremely poor business was sustained for an additional period of over two years.

[fol. 260] It is true that the automotive industry, like all other industries throughout the nation, was compelled to become more efficient, effect more economies and generally to conduct their respective businesses in a more business-like manner due to the sharp recession in motor vehicle sales.

The problem was very simple. The great mass of the American people had become seriously impoverished and while their was a tremendous desire to purchase new cars, the wherewithal was lacking. The solution to the problem was increased employment in all industries and a reduction in the price of automobiles made possible through greater efficiencies in automobile production. The Motor Vehicle Retailing Code in no measure accomplished the re-

covery in the automotive industry. In the language of Alfred P. Sloan, Jr., President of the General Motors Corporation in a statement made on June 30, 1934 to the stockholders of that corporation:

"In the quarterly reports that have been sent to stockholders during the past twelve months, as well as in the annual review of the year 1933, attention has been called to the effect on the Corporation's position of its compliance with the national recovery programs, particularly with respect to the policies of the National Recovery Administration. Hours have been shortened; wages have been raised; important increases in the cost of materials have had to be absorbed. Increased costs have resulted not only from the direct influence of higher levels of expense, but through the indirect effect of a lowering in operating efficiency. On the other hand, the economic influence of these national recovery programs on individual purchasing power has, in principle, been to reduce the spread between the real cost of living and real income. That being the case, manifestly, purchasing power is not available to sustain selling prices commensurate with increased operating costs. The question of the profit margin of industry therefore arises, although these adverse influences are partly offset, at least in some instances, by increased turnover.

"This set of circumstances reflects the trend of industry in general, and although unsatisfactory, should not be accepted by industry as a set of conditions under which it [fol. 261] must necessarily operate permanently. On the contrary, it should be looked upon as a challenge and an incentive to regain what has been lost, to establish even higher standards of operating efficiency, on the one hand and to develop new and more effective products, on the other. The objective should be not merely a more favorable relationship of cost to selling prices, but what is of more vital importance, real selling prices themselves must be reduced—they must be brought within the range of a greater number of buyers. In no other way can industry be stimulated to higher levels of activity—in no other way can the unemployment question be intelligently attacked—at least that is the thinking of General Motors and its approach to the problem.

Alfred P. Sloan, Jr., President."

Mr. Ammerman again makes a rash and unsupported statement when he states:

"This decline continued to a point where the capital investment of 1932 equalled approximately one-third of the capital investment of 1929."

There is absolutely no foundation in fact for a citation of statistics to bulwark this ridiculous proposition. If capital investment had dropped 66⅔%, it is reasonable to assume that at least that number of retail dealers would have been forced out of business. Such is not the fact. It is also reasonable to assume that the drop in capital investment of the dealer ran proportionately to the drop of the automobile manufacturers. Mr. Ammerman himself cites the following facts:

"The capital investment in automobile manufacturing was reduced from over $1,950,000,000 in 1929 to approximately $1,490,000,000 in 1932."

This drop is approximately 25% and not the preposterous figure of 66⅔% cited by Mr. Ammerman.

Mr. Ammerman makes another rash assertion without foundation in fact:

"In 1929 more than $75,600,000 was paid by the retail automobile dealer for rent or leases on the premises occu- [fol. 262] pied by them. In 1932 the reduction was in proportion to the percent of reduction in sales."

In 1929, 5,621,715 motor vehicles were produced. In the year 1932, 1,431,494 motor vehicles were produced. The 1932 production was approximately 25% of the 1929 production. Any fair thinking reasoning individual realizes that no dealer was successful in reducing his rent in any like proportion. It is conceivable that rents may have been reduced 15%, 20% or 25% but certainly not 75% in proportion to sales. Mr. Ammerman's statement is unquestionably without foundation.

Mr. Ammerman, however, makes one very significant point when he states:

"He (retail dealer) must be so located because of the exigencies of his business, for he is not alone a salesman of a sales agency but he services and repairs for the consumer the commoditiy he sells."

The retail dealer is immeasurably in a better position than the manufacturer of automobiles. He has a double-barrel gun to serve as the source of revenue. First, he derives a substantial source of income from the sale of new and used cars. Second, he derives a substantial income through the rendition of servicing and repairing of automobiles that he has sold. Throughout the depression, the public at large abstained for the most part from the purchase of new cars. They continued to use their old cars and in the course of time these old cars fell into disrepair. This was more so true during the years of depression, because old cars were not abandoned as readily as in years gone by. The second result was that the service department of practically every retail dealer enjoyed far better income than in previous years. The best illustration in recent years of this very fact is that in the year 1927 Ford Motor Car Company went out of production. Not until [fol. 263] 1929 did they offer to the public a new model. The dealer sustained himself for a period of almost two years almost exclusively from the income derived from the sale of parts and accessories and the rendition of service for repair. This definite source of income has been definitely ignored both by Mr. Ammerman and all of the other affiants in endeavoring to paint an aggravated picture of the unfortunate plight of the retail dealer. Mr. Ammerman endeavors to mislead this Court in citing elaborate figures of the unfortunate plight of the manufacturer of motor vehicles. He totally ignores and fails to advise this court that unlike the manufacturer, the dealer at all times had a constant source of income from his service department and the sale of parts and accessories.

Mr. Ammerman makes considerable of the discussion of "legitimate" dealers and "illegitimate" dealers, of "bootleg" dealers and "bootleg" deals. It is hard to understand what he means, because he does not cite a single illustration of what transactions are legitimate and what transactions are illegitimate. Prior to the adoption of the code, dealers in motor vehicles conducted themselves as all other dealers of other commodities. They could sell to whomever they pleased at such prices as they desired. How in the light of such facts a dealer could be characterized as legitimate or illegitimate is hard to determine.

Another extreme statement of Mr. Ammerman is as follows;

"Governmental supervision was the only means of saving the motor vehicle retailing industry."

As I have definitely proven in the statistics cited, the retail dealer throughout the nation was enjoying a vast improvement in business in the five months immediately pre- [fol. 264] ceding the adoption of the Code. As a matter of fact, the increase in volume of business of the year 1933 over the preceding year 1932 substantially dropped after the adoption of the Code. If we are to draw a deduction from this observation, we must come to the conclusion that the enactment of the Code seriously impaired the sale of new cars. The following statistics bear evidence of this fact:

Month.	1932.	1933.	Percentage of increase of 1933 over 1932.
May	149,978	181,167	18%
June	166,628	197,444	35%
July	118,919	216,302	103%
August	108,538	207,460	153%
September	96,860	189,245	132%
October	51,625	138,365	173%
(Price Provisions of Code Effective November 3)			
November	61,761	62,974	3%
December	109,472	83,755	23% (Minus)

Certainly an observation of the statistics would seem to indicate that a collapse of the sharp recovery enjoyed by the industry took place immediately upon the adoption and enforcement of the Code. One thing is certain, however, that a sharp increase of recovery was manifest for a long period before the Code was adopted, and consequently to attribute recovery to the Code is to draw a deduction that is remote from the truth.

Mr. Ammerman discusses government regulation and control as a panacea of all ills for the Motor Vehicle Industry. Unfortunately, the facts and statistics do not bear him out. Violation is rife; adherence to the code is rare. [fol. 265] This has been caused through the fundamental difficulty and error in establishing fictitious values for used car trade-ins. The Code provisions were based upon the theory that the public would pay high and exorbitant prices. Such is undoubtedly conceived in a fallacy of reasoning. As was stated by Alfred P. Sloan, Jr., the problem was to bring the purchasing power of the people close to the cost of living. The price regulation attempts of this

code sought to effect the very opposite by imposing an excessive burden upon the public.

Mr. Ammerman condemns the use of appraisal books in the past in the following language:—

"These appraisal guides as published were based on unsupported reports furnished by some of the dealers. But, in this manner they were able to establish an allowance price to suit their own desires and the consuming public was left with no available remedy except to side with those men in the manner prescribed by them to their mutual detriment."

We cannot entirely agree with Mr. Ammerman that it was to the mutual detriment of both public and dealer. Such guide books were for the advancement of the interest of the dealer. Mr. Ammerman then endeavors to show that the present guide book promulgated by the National Automobile Dealers' Association remedies the defects of the old guide book. This is absolutely false. The same fictitious manner of arbitrarily fixing a price apparently seems to be employed in the present guide book. As set forth in great detail in my original affidavit in this application, I conclusively proved that the National Automobile Dealers' Association had rejected sworn affidavits of used car sales that were to be used in the calculation of an average pursuant to the terms of the code. These sworn statements were rejected and returned to the sending dealers because they did [fol. 266] not meet with the whim and caprice of those that sought to fix fictitious values on behalf of the National Automobile Dealers Association. How the method of calculation and fixation of values can be different from that of the methods used with the old guide book is hard to discern. Like the old guide books, the values were first established. Then supporting data was sought to justify such valuation.

Mr. Ammerman in further describing the method employed to establish the maximum allowance to be permitted on the trade-in of used cars, states:

"By using these figures and in the manner prescribed by the Code an average was struck determining the average used car allowance granted by dealers during a given period of time. In this manner the consuming public and not the

dealer determine the maximum price to be allowed when the used car was used as a medium of exchange."

How Mr. Ammerman can conceivably say that the consuming public determines maximum price by striking an average, is hard to discern. An average must contemplate values below and above the average. To establish the average as a maximum figure is to deprive prospective purchasers owning cars worth more than the average of the true and honest value of their trade-in. Certainly the public was getting the short end of the trade.

Mr. Ammerman again generously states:

"Without having definite figures to show the trend of business today it is impossible to state definitely the actual value of the code as adopted by this industry and under which it is now operating. Surveys conducted by various agencies have definitely proven that the industry has benefitted to a large extent because of the code."

First Mr. Ammerman states that it is difficult to determine the actual value of the code and then states that there has been a number of surveys made. Who made these surveys? What is the conclusion arrived at? There seems [fol. 267] to be no supporting data in this affidavit. The scant surveys made by those submitting affidavits on behalf of the defendant in this case have been rank, lacking substance and without true foundation. For a government official who prides himself in the knowledge of the industry and in the survey that he has made as administrator of the code, general statements of this kind without even a reference to the specific survey made must truly taint the significance of his other remarks. I challenge Mr. Ammerman to produce one single responsible survey that would clearly attribute any improvement in the industry directly to the operation of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

Analysis of the Affidavit of Jack Frost

Jack Frost, from his own admissions, is the outstanding statistician for the industry. He states:

"The monthly publication of the said official guide is prepared and published under my personal supervision and direction."

Much time and detail must be devoted to the assertions made by Mr. Frost to demonstrate the soundness or the fallacy of his represented facts and conclusions deducted therefrom.

Mr. Frost, in his own language, is responsible for the publication of the guide book that is the foundation of maximum prices allowed for trade-ins in the purchase of new automobiles. An analysis of his affidavit will clearly disclose the ability of the man in whose hands the destiny of all the dealers in the entire United States is. I say "destiny", because an abuse of this maximum price provision will cause so great a retardation of sales, as to effect a tremendous loss of profit to every dealer throughout the [fol. 268] land.

Mr. Frost spends almost four pages in an attempt to impress this Court with the fact that he is an expert in the collation of statistics relating to the automotive industry. Analysis of the affidavit seems to very effectually defeat this fact.

Mr. Frost states:

"The inability of the industry to pay fair wages and hours because of losses sustained by them through the trade-in allowances given on the sale of new cars, caused the Administrator to finally approve and present the existing Code of Fair Competition for the Motor Vehicle Retailing trade."

This is not true. The Code of Fair Competition for the Motor Vehicle Retailing Trade was presented to the President of the United States for approval because it was part of a gigantic recovery program, the primary object of which was to re-employ more people at a fair wage. As an incident to this program, the government offered as an incentive to industry in carrying the additional burden that these labor provisions entailed, certain fair trade practice provisions that sought to eliminate certain abuses in this industry. It is absolutely wrong to state that over allowances on trade-ins was the only cause for the non-payment of fair wages and hours. It is a well-known fact to any laymen walking the streets that the years 1931, 1932 and 1933 were fraught with the ravaging affects of a depression that had no precedent in the history of this country. This fact and this fact alone caused the enormous

unemployment which affected all industries, including the Motor Vehicle Retailing Industry. It is true, of course, that the sharp reduction in business created a keener competition out of which certain abuses arose, but to attribute one of those abuses as the cause for vast unemployment is a [fol. 269] superficial fallacy.

As a matter of fact, the vast abuses of labor that were so typical of other industries, such as cotton manufacturing and coal mining, never found its way into the motor Vehicle Retailing Trade. Though wages had been reduced, the average employee always received a fair and living wage throughout the entire depression in the great majority of retail dealers' establishments.

Mr. Frost discus-es practice in the past of printing and distributing of used car valuation guides. Apparently the practice in the past has been to establish fictitious values, substantially under the true value of a used automobile. These appraisals were commonly known as "shock appraisals." The object of this under valuation was to display the valuation to a prospective customer, and then with a false air of generosity, offer the prospective customer a valuation greater than that established in the guide book. Unquestionably, the theory was to deceive the prospective purchaser and lull such a purchaser into a false sense of having received an unusual value. This practice was almost universal a few years ago in the preparation of such guide books. The average purchaser of a new car soon became aware of such deceitful practice and refused to place confidence in such "shock appraisal" guide book or the unctuous false generosity of the dealer. Such purchaser totally disregarded the guide book and shopped other dealers to secure the best value in the purchase of his new car.

Even today, buyers of automobiles place no value in the official guide book and continue the practice of recent years of shopping many dealers to secure the best value obtainable.

[fol. 270] By this same token, a prospective purchaser of a new car who sought to trade in a used car, which used car was of greater value than the average price established as the maximum trade-in allowance, was never content to accept the guide book maximum trade-in allowance figure. Such prospective purchaser shopped every dealer until he found a dealer willing to offer him a true and honest value

for his trade-in, though the same might be in violation of the Code. I do not feel that in this period of stress, that such purchasers should be condemned in seeking a fair and honest value for their trade-in, though it entails a violation of the code. It is somewhat paradoxical when one honest man seeks out another and induces that other honest man to violate the law so that an honest exchange of values may be completed.

Mr. Frost states:

"The Court should note the fact that the complainant in his papers admits that he is a violator of the Code."

This is absolutely false. The complainant, through its officers, has repeatedly denied any violation of this Code up to the present time.

Mr. Frost further states:

"Nowhere in his papers does the complainant aver that under the provisions of the Code of the National Industrial Recovery Act, he has attempted to correct any of his alleged inequalities or inequities though the code has been operating as a law since October 3, 1933."

I challenge Mr. Frost to suggest any method that might have been employed by the complainant to correct any such inequalities or inequities. The complainant, through its officers, at every trade meeting and at every contact with [fol. 271] officials of the Administration, has repeatedly expressed its condemnation of the so-called "fair trade practice provisions" of this code.

Mr. Frost further states:

"The complainant herein after a period of nine months since the adoption of the Code now for the first time endeavors to assail the code and the laws under which it was enacted and after one of his violations has brought him to answer a charge in the criminal courts of this state."

This is an unfair attempt to prejudice the mind of this Court. The complainant has not stood by without expressing dissension to the code provisions but has availed itself of every opportunity to do so. The complainant is not guilty of any violation of the Code. The present proceed-

ings now pending in the Magistrate's Court are so basically unjust and without foundation in fact that it has acted as a stimulus to the prosecution of this very application by the complainant.

On February 27, 1934, the complainant addressed a telegram to Administrator Hugh S. Johnson, requesting a hearing to present to the Administrator the extreme hardship the code was inflicting upon all honest dealers, including the complainant. This telegram was sent after a public radio address by the Administrator, advising the general public at large that a hearing would be had wherein all complaints to existing codes could be voiced. In response to this telegram, a telegram was received from the National Recovery Administration reading as follows:

"Spielman, Chevrolet: This group of meetings is not to be discussion on any individual codes, though individual codes may be used as illustrations. Stop. Glad to have you appear before Group 4 on code administration and may if you so desire. Stop. Advise if you wish reservations [fol. 272] for Thursday.

National Recovery Administration, Conference Committee Room 133, Willard Hotel."

This telegram was sent at 6 P. M. February 28, 1934. The Thursday made reference to was the following day. When the telegram was received, it was absolutely impossible to arrive in Washington in time to be heard. Further, in view of the fact that the discussion was to be merely general, it was useless to expend any additional effort in a discussion of generalities. In light of this effort and all of the other efforts made on behalf of the complainant, it cannot be said that the complainant did not do everything within its power to secure some redress from the harshness of Code operation. Furthermore, on June 29, 1934, the complainant wrote to Deputy Administrator K. J. Ammerman, in charge of the administration of this Code, objecting to the high-handed method of assessments in the Code, and in such letter further stated:

"In expressing our objections, please understand that we are in full sympathy with the N. R. A. as it relates to such themes as maximum hours, minimum wages, spreading of employment and other conditions that would make the

people we employ happier as well as more prosperous, but we are definitely opposed to the regulations and market rules that actually reduce the volume of business of honest dealers. Our experience has been that the non-enforcement of these price regulations has been an ideal smoke screen for an unscrupulous dealer to work behind and eventually honest dealers must lose their patience as well as their good will and business and eventually become chiselers to preserve themselves."

Mr. Frost spends considerable time in a discussion of trade-in allowances. Mr. Frost characterizes the practice of trading-in automobiles as the vice of the industry. Apparently he little realizes that this practice has been a very substantial factor in the tremendous growth of the motor vehicle industry. If patrons had no facile method of dis- [fol. 273] posing of their old cars, there would be a tremendous handicap in the sale of new cars. Furthermore, the acceptance by a dealer of a used car affords him an opportunity to keep his service department operating at full blast restoring the used car to a condition where it is readily disposable. A further profit can be made in such disposal of the used car. In other words, while every new car dealer is for all practical purposes also engaged in the used car business, it affords such a dealer an opportunity to reap two profits, i. e., one on the sale of the new car and the second for the service rendered in re-conditioning the old used car. Therefore, the development of trade-ins should be treated as a boon to the industry, rather than the vicious vice that Mr. Frost would have the Court understand.

It is true, however, that this development of the industry has made it more complex and created more problems. Mr. Frost treats with the cost of handling used cars in the following language:

"At the time that the motor vehicle retailing code was being presented to the N. R. A., the N. R. A. made a test of over five hundred dealers' costs of handling used cars, and it was found that the average cost of these five hundred dealers amounted to 21% for handling and re-conditioning the used car."

I cannot understand the significance of these remarks. The figure 21% is cited. 21% of what? When was this

survey made? Under what circumstances? Even without this information, this survey is manifestly unfair for the following reasons: First, a survey of 500 dealers out of an aggregate exceeding 45,000 is too small a strata to draw a logical deduction. Certainly an amount slightly over 1% of an industry cannot truly portray the proper conditions. [fol. 274] Second, assuming that this survey was made sometime in the year 1933, statistics establish that only 29% of the normal sales were actually consummated during said year. The cost of handling any car is primarily determined by overhead. Basically, the overhead of a retail dealer is fixed. His rent is fixed. Most of his employees work on straight salary and with the single exception of salesmen's commissions, there is no substantial variable factor of expense. A dealer could almost as economically handle sixty cars as he could thirty. Consequently, the amount of overhead to be attributed to each car will be determined by the volume handled. In a year where the sales attain only 29% of normalcy, it is not fair to draw a conclusion based upon percentage, where so large a portion of overhead ias assessed to each unit handled.

The Code of Fair Competition for the Motor Vehicle Retailing Trade has endeavored to establish certain practices that would be preeminently fair to all dealers, yet this very Code finds it sufficient to allow 5% for such handling on cars of current series model, 10% for handling for the next two preceding models, and 15% for handling all models prior thereto. Yet despite this range of 5% to 15%, Mr. Frost would have this Court understand that the Code had fixed an absurdedly low figure, and that the general average is at 21%. As a matter of fact, in the later figures cited by Mr. Frost, he clearly establishes that the figures established in the Code are approximately correct. This definitely refutes the value of the survey made of the 500 dealers.

Mr. Frost rambles into an irrational discussion of hazards caused by the handling of used cars, in the following language:

[fol. 275] "By 1929 the used car was such a hazard through new car price alteration, that it became practically impossible to get salesmen to function in the capacity for which they were employed, namely, to go out and bring in business, to the dealers' sales room. After a salesman

would spend the necessary time in developing a prospect and making an offer on the used car, in many cases another salesman would arbitrarily make a higher offer on the used car, with the result that the new car price set by the factory and beyond the dealer's control was arbitrarily changed or reduced."

Ever since the inception of the automotive industry in 1895, there has been competition between dealers of the same make of car as well as the makers of different cars. To characterize such procedure as a hazard and to discuss the loss of a salesman's function because of such normal competitive action, is absolutely absurd. Why Mr. Frost should single out the year 1929 of all years to display that such a condition existed is beyond my comprehension. Salesmen have always functioned as the contributing influence to the closing of sales. Such effort was required whether the sale contemplated a trade-in or not. Certainly their function did not vary in the year 1929 or any other year, and frankly the year 1929 was the most prosperous year in the history of the automotive industry and certainly must have likewise redounded to the benefit of all salesmen for their splendid efforts.

Mr. Frost then states that by reason of the extreme keenness of prospective buyers and their desire for shopping for the greatest values, dealers were compelled to accept trade-ins at substantial losses. In his language the following results were attained:

"This practice became so general that by 1933, it was reliably estimated that not over 5% of the automobile dealers in the United States were solvent."

[fol. 276] This statement, made as it is by one who supervises the preparation of a guide book that establishes the prices to be paid for all trade-ins for the industry, is certainly an illuminating display of his abysmal ignorance of the entire situation. Excessive trade-in allowances never precipitated such calamitous condition in the industry. As I have explained in detail in the discussion of other affidavits, the loss of business in the automotive industry was directly attributable to the impoverishment of the great American public by this industrial depression. It would be absurd to assume that 93% of the dealers would consciously

accept trade-ins upon which they would sustain great losses to a point where they would be insolvent. Certainly, the bankruptcy records of Dun & Bradstreet would disclose a mortality of business organizations in this industry greater than perhaps any other industry throughout the nation. As a matter of fact, this industry has suffered no more than the average industry and has fared considerably better than the automobile manufacturers. I do not believe that during any period of the industrial depression, any greater proportion than perhaps 20% of the dealers were in an insolvent state. To rashly assert that 19 out of every 20 dealers were insolvent and unable to meet their constantly recurring obligations is to taint every conclusion that Mr. Frost advances with a prejudice not founded in fact.

To support his contentions, Mr. Frost asserted that the average salesman earned less than $900 per year. A salesman earns his commission irrespective of whether the dealer makes a profit or loss on his trade-in, so that an abuse of trade-in practices would never have materially reduced salesmen's income. What did reduce salesmen's in- [fol. 277] come was a drop to 29% of normalcy of all sales throughout the nation caused solely by the influences of the depression.

Mr. Frost again displays the preposterous extremes that his reasoning has attained, when he states:

"Banks refused credit to automobile dealers as such in view of the fact that the product which they sold had no established price inasmuch as the delivered price of an automobile meant nothing when any dealer who chose to do so could alter this delivered price by merely increasing the allowance on a used car."

Variation of used car allowances has been the practice in the last three decades during which period the banks of the nation have, at frequent intervals, loaned vast sums in the financing of automobile dealers. To attribute the variation of trade-in allowances as the cause for the restriction of bank loans is preposterous. The department store owner, with thousands of items on his shelves, is constantly changing and varying the price of his articles, but the banks are not indisposed to extend large loans and credits. Likewise, dealers in practically every commodity affected by the market variations have secured large loans though

the fluctuations of values may be daily. The only reason for the restriction of loans is because all banks restricted their lines in an effort to bend backward in conservatism and to remain liquid.

Mr. Frost again displays the immaturity of his childish reasoning when he states:

This naturally resulted in terriffic loss to the automobile dealers throughout the United States and a dissipation of their capital. The result was that all dealers who were not encumbered by lease which prevented them from going out of business, got out and salvaged such of their remaining capital as was possible. The balance who were unable to close their business fired every employee that they possibly [fol. 278] could, cut the wages of the remaining employees and endeavored to continue only through the sufferance of their creditors."

Mr. Frost would have the Court believe that every solvent merchant abandoned the stricken motor vehicle retail dealers' trade, leaving the "sick and disabled" to carry on at the expense of hardly pressed creditors and indulgent landlords. Are we to understand that these landlords permitted the dealers to remain without paying rent, or that the creditors stood by and demanded no satisfaction of their obligations? I call upon the normal intelligence and experience of this Court as to whether or not in their dealings with automobile dealers in recent years, such has been their personal findings. Nothing could be more absurd or further removed from the truth.

Mr. Frost cites the illustration that the dealers' franchises commanded a premium in 1929, but that the same has been completely dissipated during the years of the depression. Is this not true of the fabulous sums received for good will in the sales of most businesses during that prosperous era typified by the year 1929? Today, businesses, when sold, do not usually evalulate good will but usually base the sales price upon the current value of the investment. Mr. Frost, however, attributes this loss of value to good will to the fact that trade-in allowances varied among different dealers. Such reasoning is unsound. Mr. Frost displays a gross ignorance of the initial and primary purpose of the National Industrial Recovery Act when he states that the National Industrial Recovery Act was created

"to investigate the vices and abuses of various industries and if emergency measures were needed to create them so that codes of fair practices could be expeditely established and men be taught to conduct their business in honest fashion, so that those dependent upon the particular industry by way of labor and the dealers themselves should [fol. 279] and could create a profit and creep out of the mire of depression."

Fair trade practice provisions were an incident to the recovery program and were granted as a concession to industry to aid them to carry the burden of shorter hours and better wages. The object was not to create profits on the part of industry.

Mr. Frost devotes many pages discussing in detail the method employed in complying with the provisions of the Motor Vehicle Retailing Code relative to used car allowances. The exact provisions of the Code, Article IV, Subdivision A, provide:

"A. Used Car Allowance.

"In an effort to prevent sales below cost, heretofore due to unfair competition that has resulted in the dissipation of the large part of the capital originally in this trade and has accumulated large losses since 1926, this trade agrees to regulate itself so as to return profit possibilities and support increased wages and shortened hours.

"Giving consideration to the public interest and to prevent sales below cost, it is hereby provided:

(1) That the value of any model of used motor vehicle, either passenger or commercial, shall be the average price that the public in any given market area is then paying for such vehicle as ascertained by the Association from sworn statements of all actual retail sales to consumers, subject to the approval of the Administrator. The Association shall publish the average prices thus ascertained approximately every 60 days. In order to insure fair average value in the interest of the consumer, published averages shall be computed for the preceding period and there shall not be included in computing such average that 20% of sales which represented the lowest sales of all actual sales reported in the previous period.

(2) That no dealer shall, directly or indirectly, or by subterfuge, accept in trade any used vehicle at an allowance price of more than its value as ascertained in paragraph (1) above, less a minimum selling, handling and [fol. 280] reconditioning charge, according to the following schedule:

(a) Five percent of the allowance price as determined in paragraph (1) above, on (x) the current series model, or (y) the preceding series model;

(b) Ten percent of the allowance price as determined in paragraph (1) above on the model preceding, the two models described in paragraph (2) sub-section (a) above, namely, (x) and (y).

(c) Fifteen percent of the allowance price as determined in paragraph (1) above, on all models other than the three models described in sub-sections (a) and (b) above.

(3) To provide a record for the establishment of used car allowances in paragraph (1) above, there shall be provided in each logical trading area of the United States an Official Guide, which shall be provided by the Association which shall be known as the Association Official Guide and shall be recognized as the authority for such allowances, and which shall be based upon actual sales in each trading area for the period of approximately sixty days preceding the date on which the compilation of the official guide is started, as hereinabove provided.

(4) There shall be used as a basis of establishing allowance values, as provided in paragraph (1) and (2), above, the principle of averaging actual sales at retail to consumer for the preceding period. Since this will, in isolated instances, by reason of very few or no sales on particular models, leave a need to establish a guide figure on such models, the following method of determining the allowance values will be pursued for the public protection, namely,

(a) If any model of motor vehicle described in the Official Guide shows five or more sales at retail to consumer within the district in any period, then the average figure published becomes the maximum allowance for the ensuing period.

(b) If any model of motor vehicle has less than five sales at retail to consumer within the district for the period then the new car dealers handling this particular make car within this district shall establish its allowance value, the same to be so published in the report. These figures to be subject to approval of the Advisory State Committee and the Administrator.

(c) If any make or model of motor vehicle is not represented in the district or is no longer manufactured and less than five sales at retail to consumer are reported on each or any model of such car, then the Advisory State Committee, subject to the approval of the Administrator, will set the figure based on what like models of other makes sell for in the district."

[fol. 281] No reference is ever made distinguishing between "better grade" cars and "best grade" cars which Mr. Frost devotes so much time to.

One very basic misstatement of fact made by Mr. Frost is as follows:

"The average rate of depreciation on motor vehicles will run from 2½% per month to 3½% per month, dependent upon the price class upon which the rate is figured."

The National Automobile Chamber of Commerce, in its 1934 edition of "Automobile Facts and Figures" establishes an elaborate chart from the mass of reliable statistics submitted to it, that the average life of a motor vehicle is seven and two thirds (7⅔%) years. This is equivalent to ninety-two (92) months, or approximately a depreciation rate of 1.1% per month. The elaborate arguments advanced by Mr. Frost, based upon a theoretical rate of depreciation of 2½% to 3½% per month, is without foundation in fact and without authority.

Mr. Frost endeavors to establish that while the Code provides for an average price as the highest maximum price to be allowed prospective purchasers in the trade-in of their used cars, that such average, in fact, is not truly an average, and that the figure determined upon is in fact very close to the highest valuation in establishing the average. In order to prove his point, he states that the maximum price does not go into effect until approximately ninety days after the compilation has been secured and

completed; that a lapse of such ninety days would cause a further depreciation of approximately 10% (three months times an average of 3½% monthly depreciation. He further states that the elimination of the lowest 20% for junk sales is an elimination far in excess of the true number of junk sales. He then naively concludes that this approxi- [fol. 282] mate 10% of depreciation and an excessive elimination for junk sales advances the average figure to a point where it reflects almost the highest price value of the model reported.

Of course, this calculation is specious for many reasons. First, monthly depreciation is at the rate of 1.1% per month, and that even a ninety day period if permitted to elapse would only reflect 3.3% depreciation—truly a negligible item. Further, the elimination of the marginal 20% reported sales as junk sales, is truly a fair approximation of junk sales. The 1934 edition of the "Automobile Facts and Figures" compiled by the National Automobile Dealers' Association, the very association compiling the statistics for the dealers guide book in this industry, establishes that over 63% of used car sales are sales of automobiles over four years in age. It is readily understandable that even a greater percentage than 20% of these cars, when accepted in trade in the purchase of a new car, are completely junked and removed from circulation.

The citation of illustrations by Mr. Frost of current models to indicate that the marginal 20% would not contemplate any junk sales, is an endeavor to mislead the Court by selecting an extreme illustration and advancing such extreme illustration as the rule rather than the exception. We must, therefore, come to the conclusion that the average price of used cars as provided for in the Motor Vehicle Retailing Code is truly an average of used car sales of the respective models, and that if such is used to indicate the maximum to be allowed for trade-in, then all owners of automobiles worth more than the average, will not receive a true value for their trade-in if they seek to [fol. 283] purchase a new car. A further fallacy in the argument of Mr. Frost is that guide book values are constantly depreciating simultaneously with the true depreciation of the automobile.

The method of computation provided for by the Motor Vehicle Retailing Code does not permit in all instances

such a normal course of procedure. New values are established approximately every thirty days for the preceding sixty days. This does not, however, take into consideration the seasonal variations of the sixty day test period.

For illustration, the lowest prices for used cars are obtained in the Winter season of the year. On the other hand, the highest prices for used cars are obtained in the Spring and Summer. Nevertheless, the guide book would reflect in the Spring of the year the low averages of the Winter. By the same token, the low ebb of the late Summer would be burdened with the high averages of the Spring and early Summer. This can be proven by actual illustrations.

Illustration No. 1. In March of 1934, a 1933 Chevrolet 5-passenger Sedan was rated in the guide book at $499. Two months later, in May, the same model was rated at $523.

Illustration No. 2. In March, a 1933 Chevrolet business coupe was rated at $409. In May the same model was rated at $456. In June, this same model had advanced to $462.

Illustration No. 3. In February, a 1933 4-cylinder two door DeLuxe Sedan of Ford manufacture was rated at $358. In May this same model was rated at $385.

Illustration No. 4. In February of 1934, a 1933 8-cylinder Ford 5-passenger Sedan was rated at $497. In May of 1934 this same model was rated at $515.

These illustrations manifest a reversal of normal trends, [fol. 284] caused through the reflection of seasonal variations in succeeding periods.

What will be the result of this tendency. These illustrations refute Mr. Frost's statement that depreciation works in favor of establishing a high maximum for trade-in allowances. The illustrations cited prove that in many instances this is wrong and that seasonal trends will frequently reverse this tendency and work to the distinct disadvantage of the buyer at a time in the year when most purchasers desire to buy.

As a further illustration, the low prices obtained by dealers in the sale of used cars in February and March would serve to establish the maximum trade-in allowance price in April. Inasmuch as April is the threshhold of the Spring season, absurdly low maximums would discourage

purchasing and consequently retard business. Conversely, the higher prices secured in the sale of used cars, resulting in a high average for the months of June and July, would avail to the benefit of few buyers in August which is normally a poor month.

From these illustrations, we deduce that the seasonal variations re-act against the purchaser when the buying of new cars is greated and tend to favor the purchaser when the purchasing of new cars is lightest. In the course of time, this would serve to seriously discourage the sale of new cars.

Mr. Frost devotes almost twenty pages to a discussion and an attempted analysis of the figures and statements of the complainant. Before explaining the manifest fallacies of his conclusion, it would be wise to fully explain the necessary steps required in order to properly operate a used car department.

[fol. 285] The Spielman Motore Sales Co. Inc., complainant in this action, is the largest Chevrolet dealer, and perhaps the largest automobile dealer in the metropolitan area of the City of New York The following statement reflects the volume of used car sales handled by the complainant in the respective years 1931, 1932 and 1933:

Year	Unit sales	Amount of sales
1931	1228	$219,895.25
1932	1148	208,309.73
1933	1340	242,264.00

The operation of this used car department entails a great deal of business ingenuity and skill. There are more than 5,000 different make models and series of automobil-s presently in the hands of the public. Unless a dealer is properly qualified to handle the used car end of his business with the proper business-like planning, intelligent thinking and aggressive merchandising, the reflection of sales for such unqualified dealer is bound to seriously affect the averages reflected in the official guide book. In order that a dealer may secure a fair value in the sale of a used car, he must possess three fundamental requirements. First, ample capital. Ample capital will make available intelligent and efficient help, logical liquidation of his used cars at the proper seasons of the year and ample facilities. Second, sales outlets at stragetic points. Proper displays

of automobiles in inviting show rooms attract fair figures for used cars. Dilapidated lots and old sheds bring ridiculously low prices. Every car requires at least 125 square feet of space in which to be properly displayed. If a car is pushed into crowded quarters, the public will not pay as [fol. 286] well, and the result will be a lower general average reflected in the official guide book. A proper reconditioning of the car is essential to securing a fair price. Lack of such proper handling and conditioning means low averages. Third, capacity on the part of the dealer to supervise the used car department. A dealer must be able to buy his cars for not more than that for which he can re-sell them. He must be able to supervise the reconditioning, to see that the same is done promptly and efficiently. He must be able to prudently advertise to create a demand for his merchandise. He must be able to keep his stock in proper balance and to avoid over-stocking that will compel rapid liquidation and severe losses. He must see to it that his sales department properly treat their customers before and after the customer has purchased an automobile, for with indifferent treatment, it stands to reason that the public will pay only for what they get. Finally, it is necessary for him to see that once a man has bought an automobile that that man gets the proper service during the warranty period under which the particular car may be sold.

In conclusion, when dealers lack any of the foregoing qualifications, the result must be a lower price for their used cars and a consequent lower average for the guide book figures. This makes the prospective buyer of new cars suffer and lose some value that he is rightfully entitled to receive, because many of the dealers are lacking the three practical qualifications aforedescribed.

Another illustration of methods that cause a reduction in the average price and consequently the maximum established for used car trade-ins, is the practice of reducing the price of a used car which is sold subject to the accepting of a trade-in. If the allowance on the trade-in is [fol. 287] greater than that permitted by the guide book, the price of the automobile sold is reduced so as to bring the trade-in allowance within the provisions of the guide book. The result is a lower average for the sale. For an illustration on this point: the dealer desires to sell a particular car for $500, and the customer in this case has an

automobile to trade in the true value of which is $150. The guide book, however, permits a trade-in allowance of only $100. In order to complete this sale, the selling price of the first automobile is reduced to $450 and the trade-in allowance to $100, so as to bring it within the code. Though the car sold is worth $500, it is reported at $450, thereby reducing the general average for that particular model. This occurs quite frequently because it is the only legitimate solution to the problem presented. Both these illustrations, that of the improper sale of used cars, and the second, that of reducing the price of a used car so as to bring the trade-in within the provision of guide book, operate to reduce the average which serves as a maximum for all trade-ins of that particular model, to the detriment of the future buyer.

Mr. Frost analyzes the sales of used cars reported by the complainant, and arbitrarily concludes that these reports conclusively prove that the maximum prices reported in the official guide book were far too high if compared with the sale of used cars by the complainant.

Mr. Frost reports 317 sales by the complainant at less than the amount of the figures published in the Official Guide current with such sale. Only 87 sales by the complainant were at an amount greater than the figures published in the Official Guide current at the time.

Through an elaborate dissertation and break-down of [fol. 288] each fact, Mr. Frost continues to repeat that these reports of used car sales establish the following:

1st: Used car maximum trade in allowances are too high;

2nd: The complainant has defrauded the purchasers and afforded a lesser sum than they were truly entitled to.

Neither one of these contentions are true. The reasons are very simple. The complainant has strictly complied with every provision of this Code of Fair Competition. Most of the other dealers engaged in the metropolitan area of the City of New York have been forced through the economic necessity of sustaining themselves to violate the price provisions of the Code. The result has been that wherever a purchaser offered to trade-in an automobile worth more than the average, the complainant was compelled to express his regrets that he was unable to offer

any more than the average established by the guide book, less the handling charge of the 5%, 10% or 15% as the occasion demanded. Such prospective purchasers, in most instances, took their used cars and sought out a dealer that was not as scrupulous and induced such dealer to afford them the true value of their vehicle, though such allowance was contrary to the provisions of the Code.

For the most part, the only trade-ins that were accepted by the complainant were vehicles that were worth less than the average established in the guide book. The owners of such automobiles could receive no greater allowance because their vehicles were no more than the average.

The result of all these operations; the result of the strict compliance, has resulted in the accumulation by the complainant of a mass of cars, practically all of which were accepted in trade-in at a price less than the average which [fol. 289] represents the maximum trade-in allowance, pursuant to the guide book. The cars that were sought to be traded in worth more than the average were forced into channels of other dealers who secretly violated the code and extended to the purchaser a value greater than that permitted by the guide book, but in fact the true value of the vehicle.

This accounts for the fact that the vehicles in the possession of the complainant were for the most part less than the average established as the maximum in the guide book, and consequently, upon re-sale, in most instances a price less than the maximum established was received.

I can unqualifiedly say that if I had desired to openly and flagrantly violate the provisions of the Code, the bulk of the automobiles received in trade would have been worth, in most instances, in excess of the average established as a maximum in the guide book.

An attempt by Mr. Frost to distort these quite obvious facts into an admission on the part of the complainant that the average prices are too high, is a probable attempt to mislead this Court into the belief that the average prices are in fact not average but exceedingly high.

In light of the above described fact, it would be a useless waste of time to endeavor to answer the minute calculations of Mr. Frost. It is proper at this time, however, to point out that in all calculations, Mr. Frost has deliberately omitted to take into consideration the 5%, 10% and 15%

handling charge that must be deducted from used cars accepted in trade if based upon the average prices established as maximum by the Official Guide Book.

On page 23, the bottom of the page, Mr. Frost admits that the automobiles sold by the complainant were in fact sold at an average of $2.30 more than the maximum provided for [fol. 290] in the guide book. This taken in light of the fact that the average trade in received by the complainant were automobiles in poor condition, because owners of automobiles offered for trade-in worth more than the average had abandoned the complainant and sought out law violators who would have no compunction to accepting a trade-in in excess of the guide book maximum but at a figure that would truly represent an honest and fair value.

Mr. Frost cites three distinct illustrations to prove his point, to indicate that the elimination of the marginal 20% as junk sales, sharply increases the average. This is absolutely false. The very statistics heretofore cited indicate that more than 63% of all used cars sold are cars that are over four years of age, where the amount that is junked runs frequently far in excess of 20%. Consequently, the fact that practically no automobiles are junked in the sales of current models is counter-balanced by models four years and over. The 20% deduction permitted by the Code is a true reflection of the number of cars that are actually junked. There were more cars junked in the years 1933 and 1932 than there were new cars manufactured and sold. Certainly, under such circumstances, the proof would clearly display that the junk provision of the price regulation does not effect an increase in the average.

In the extreme illustration of the Studebaker automobile, where the code maximum is in excess of the dealer's purchase price for a new car, nothing need be said. It is an extreme illustration and is not at all typical of the operation of the maximum price regulation of the Official Guide Book. The situation cited therein is theoretical and rarely is ever consummated.

Mr. Frost, under the guise of "consumer interest" launches into fallacious argument in an attempt to establish [fol. 291] an interest in the consumer. Briefly, he states that to establish low maximum prices for trade-in used car allowances would permit dealers to acquire automobiles at low

maximum prices which they may in turn offer to used car buyers at approximately the same level. This argument is ridiculous. An automobile obtained at an extremely low price by the average dealer will not be sold by him at less than the prevailing market, which may be substantially more than the price that he has paid for it. Of course, under such circumstances, the purchaser of the new car sustains the loss which the dealer gains.

Mr. Frost, in the further devolopment of this argument, states that if excessive maximum prices are established dealers will foolishly pay high and excessive prices for used cars, and consequently they will be compelled to offer such used cars to the public at such high prices. This argument is not founded in good sense or logic. Dealers will not pay prices that run in excess of the true value of the vehicle, and consequently, under such circumstances, there is very little opportunity for over-paying the purchaser of the new car and then over-charging the buyer of the used car.

Mr. Frost, in answer to the charge made in my affidavit on the original application that the averages established by the National Automobile Dealers Association were in fact not averages but arbitrary price fixing by that Association, endeavors to explain how such an incident occurred. I have described in great detail in my original affidavit how this National Association, when it found sworn statements of used car sales to be inconsistent with what they thought was a fair price, had the same returned to the dealers throughout the country, rejecting them through the use of [fol. 292] a mimeograph letter, which stated that the reports were rejected because they were extremely low or extremely high without specific reference to any specific report.

There can be no question but that this Association endeavored to arbitrarily establish such prices as they desired and not averages as the code requires. Their excuse for their conduct is limpid and without body. Mr. Frost states:

"At the time this letter was sent, the compilation department of the N. A. D. A. was working under great stress in order to complete the first edition and place it in the hands of all dealers at midnight on November 30, 1933. The letter which was sent out was written by one of the employees

of the compilation department and after being read by officials it was seen that the lette rwas abrupt and inaccurate. We therefore immediately issued a letter expressing regret for the abruptness of this mimeograph letter and explaining why these sales reports had been returned."

It is difficult to understand how such a drastic matter of policy could have been nothing but the blunder of some unimportant clerk. Further, it is difficult to understand how hundreds of these form letters were mimeographed and despatched to dealers throughout the country without the knowledge of some one in authority. It is also difficult to understand how the National Automobile Dealers' Association employed the used car sales reports of Mr. Spielman when, after it had been returned to him, it was never again forwarded to the National Automobile Dealers' Association.

Mr. Frost frankly admits that the National Automobile Dealers Association improperly deviated from the established method in the calculation of the prices set forth in the Official Guide. Mr. Frost states:

"The right to make the test in connection with the letter referred to is obvious. The Code specifically provides for the use of sales reports over a period of sixty days previous [fol. 293] to the period of compilation, and at the same time evidence is herewith submitted showing clearly that the association used the reports covering a period of ninety days previous to the publication of the first official guide."

Mr. Frost endeavors to establish that there is no price fixing in the Motor Vehicle Retailing Trade, and that the only price fixing is that employed by the manufacturers of automobiles. As a practical matter, no prices are fixed by the manufacturers of automobiles. Factory prices are suggested and recommended. The Code of Fair Competition, however, in Article IV, Sub-Section 3, provides:

"B. Marketing Rules

The following Marketing Rules shall take effect 30 days after the approval by the President:

1. No dealer shall sell a new car at retail to a consumer for less than factory list prices, plus an amount equal to * * *"

Mr. Frost endeavors to discourage the thought that the Code and its price regulation features tend toward monopoly. One thing is certain. The method of price regulation would very seriously tend to regiment all dealers into one single straight-jacket of one arbitrary price, where the personality of service of each of the dealers would be seriously discounted. Under such circumstances, it would be a comparatively simple task for the manufacturers of automobiles to simply substitute their own agencies in place of that of the independent dealer, so that these price regulation features certainly tend toward monoplistic tendencies.

Mr. Frost takes sharp issue with me in stating that the complainant could not determine the loss of any sales as a result of his compliance with the Code. He also states:

[fol. 294] "Mr. Spielman does not submit evidence of any one of these 180 code violations. We are unable to find any record of a single violation reported by the complainant to the N. A. D. A. or to the Code Authority."

This is the rankest type of falsehood. Fifteen specific complaints of violation in the early days of the original enforcement of the Code were forwarded by Spielman to John B. Hulett, the local administrator. In addition thereto, I personally presented myself in the office of the said John B. Hulett and in great detail went over each and every one of these complaints with one Jacob Gross, the assistant to John B. Hulett. Despite all of these efforts, no progress was ever made with these reports, each and every one of which represented a lost sale. In light of my experience on these fifteen complainants, I abandoned approaching Mr. John B. Hulett, the local administrator, in full knowledge that nothing could be accomplished, regardless of how many complaints might in fact be registered. A copy of each and every one of these complaints is presently filed in the office of Mr. John B. Hulett and is specifically referred to by name and address of purchaser in the early portion of this affidavit.

Mr. Frost endeavors to characterize the assertion by the complainant of his loss of business as a mere "puff". He states:

"It is the usual alibi of the dealer or salesman when a sale is lost to a competitor to immediately say that the other dealer allowed more money. Dealers or salesmen will

never admit that they were outsold by some other dealer or salesman."

However, when one endeavors to sell a prospective customer who demands certain terms and who fails to secure such terms and returns a day or two later with a new auto- [fol. 295] mobile of the desired model, there can be no doubt in any one else's mind but that some other dealer has consummated the transactions on a more attractive basis. The vehement indignation of the complainant since the inception of the Code bears marked evidence of the tremendous burden that the Code has placed upon the complainant.

Mr. Frost again reasons like a veritable jack ass when he states with reference to my original statement that the price provisions of the Code made law violators out of honest men who seek honest values:

"We admit that it is difficult to picture an honest man asking other men to violate the law, and particularly a law that has no penalty to the buyer. Mr. Spielman, however, does not disclose how the layman not in the automobile business could accurately determine the true value of a secondhand car when 75% of the dealers themselves are unable to do so without the aid of exchange of price information."

It is absurd to think that 75% of the dealers have not a very definite idea of the used car values, particularly of the cars they deal in, as new and similar cars in the same price class. Furthermore, any layman can readily determine whether or not he is receiving a fair value for his property. The value of an automobile, particularly a popular priced automobile, is not so fraught with the mysteries of life as to prevent the average layman from having a fair conception of what his automobile is worth.

Mr. Frost, in categorical fashion, denies many of the statements contained in the supporting affidavits on behalf of the complainant, without setting forth one single fact.

In summation I frankly state that this affidavit of Mr. Frost is truly an amazing document for one who holds a position of prestige and importance in this motor Vehicle [fol. 296] Retailing Trade. The entire discourse of the affidavit is for the most part without foundation in fact or common ordinary "horse sense". In light of such fact, I urge upon this Court to disregard the contents thereof.

In conclusion, I respectfully submit to this Court that the facts as they appear in the moving papers are either undenied, principally, or have been established by such overwhelming weight of credible facts that the injunction sought for herein should be granted to the complainant.

I respectfully pray this Court of Equity to grant the complainant the relief sought for herein for this is the only forum wherein an adequate remedy against the oppression of the marketing provisions of this Code can be had.

The rights which have been urged upon this Court are fundamental rights of every citizen of this country. To deny them is to deny to those who seek them their very existence. To deny them is to remove something vital, fair and equitable in the conduct of an American business. Spielman Motor Sales Co. Inc. asserts these fundamental rights and respectfully submits that the needs of the times call for the exercise, not the sacrifice of these rights.

The right to conduct an American business in the freedom of the Democracy should be sustained by this Court at all times and the hue and cry of the bureaucrats should not deter this Court in upholding the traditions of this country and the constitutional guarantees and protection.

I respectfully submit this cause to this Court of Equity so that the Fourteenth Amendment of the Constitution of the United States shall not be a mere academic oratory subject but should be vibrant for the protection of the citizens [fol. 297] of the United States in times of stress and well as in times of prosperity.

David B. Spielman.

Sworn to before me this 28th day of August, 1934. Melvin L. Levitt, Notary Public, N. Y. Co. Clk's No. 108, Reg. No. 6L415. Commission expires March 30, 1936.

[fol. 298] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GABRIEL COHEN

STATE OF NEW YORK,
County of New York, ss:

GABRIEL COHEN, being duly sworn, deposes and says:

I reside at 450 Avenue S in the Borough of Brooklyn, City of New York, and I make this affidavit at the request of

Spielman Motor Sales Co. Inc. to set forth certain facts with respect to a transaction wherein I was involved with it in the purchase and sale of a new Chevrloet automobile.

In the month of June, 1934, I purchased a new Chevrolet sport coupe automobile from the complainant herein. As part of the consideration for the said purchase, I traded in a Willys Overland sport roadster for which I received from the Spielman Motor Sales Co. Inc., the maximum trade-in allowance provided by the Code. The car was sold to me at the regular factory list price.

About three weeks thereafter, without any solicitation, [fol. 299] one Gross, after a telephone conversation with me arranging an appointment, came down to my office. His first statement to me was that he was sent by the Motor Vehicle Code authority to investigate the sale of this new automobile to me as there had been numerous complaints lodged against the Spielman Motor Sales Co. Inc. with the Code authority. He then interrogated me as to the price I paid for the car and as to the maximum trade-in allowance which was given to me. I advised him that I secured the factory list price for the new car and the maximum trade-in allowance for the automobile trade in.

While I was relating the facts to him, he was writing them in the form of a statement which he thereafter presented to me to sign. This I refused to do as I felt there was no cause for me, a private citizen, to sign any statements or be involved in any alleged Code controversy. Upon such refusal I was admonished and warned that if I did not sign said statement I would be compelled to appear as a witness in the event that any criminal action was taken on this purchase of the car by me.

I make this statement in support of the assertions of Mr. Spielman who has advised me that almost all of the sales made by the Spielman Motor Sales Co. Inc. are being checked and investigated and that some of his customers are being harassed by investigators of Mr. Hulett.

[fol. 300] As a private citizen of this country, I think that such tactics of investigating private sales of automobiles and such espionage systems are, to say the least, detestable.

I feel that in securing the maximum Code price allowed to me by the Spielman Motor Sales Co. Inc. for my Willys Overland trade-in, while the maximum permissable price under the Code, was not the actual value of the car traded in

which was in excess of the said maximum price and worth considerably more.

As a private citizen, I cannot conceive why a governmental agency should prohibit me in securing the fair and actual value for my traded in automobile.

Gabriel Cohen.

Sworn to before me this 28 day of August, 1934. [Seal.] Melvin L. Levitt, Notary Public. N. Y. Co. Clk's No. 108, Reg. No. 61415. Commission expires March 30, 1936.

[fol. 301] Exhibit "A" to Affidavit of David B. Spielman

The New Pontiac Straight 8.

David H. Jones, Inc.

15 Valley Street, South Orange, N. J.

Phone, South Orange 2-0285—2-9664.

August 14th, 1934.

David Spielman, President,
Spielman Motor Sales Co., Inc.,
New York City.

Dear Sir:

Congratulations on your effort to rescue the automobile trade from the Frankensteins monster, which is slowly but surely draining the life blood out of the honest dealers and making fortunes for the bootlegger.

I have been opposed to the price regulating provisions of the Code since its inception and have so notified President Roosevelt, the National Association and the Newark Auto Trade Association, but my protests have made as much impression as water on a ducks back. I am inclined to believe that the trade associations are taking a purely selfish viewpoint because the code allows them to build up much stronger organizations than ever before.

Similar to your case I have taken the position that as long as the code was the law I would uphold it to the letter, believing that in a free country such a drastic law could not endure, especially after seeing one noble experiment in the prohibition law fail so utterly. Like you I have daily seen

old customers walk out of the door with a regretful look for the firm that had treated them fairly and go somewhere else to get the new car. I have even reported a couple of cases that looked like flagrant violations to the code authority, only to be told that I must also supply the name and address of the dealer who sold them the car and the price allowed, neither of which could I procure without turning [fol. 302] my automobile business into a detective agency.

Sales compared with last year for the past three months, which you know is the best selling season, average six pieces against thirty each month last year. Taking losses every month may be pleasant for some people but I have begun to wonder "what the hell I am staying in business for." Your suit offers some hope unless the Courts decision is based on a mistaken loyalty to the President and his experiments instead of on the merits of the case. I do not believe the complaint of any one dealer will get very far and offer as a suggestion that you obtain the names of every metropolitan dealer and through a circular letter invite them to become members of the "Association opposed to the price provisions of the Retail Automobile Code."

I know the factories would be pleased to see a move in this direction because it is a well known fact that the dealers are stocked to the neck with new cars and they are all running on a reduced schedule. In my own case I reached a new high of fifty six new cars on hand at one time before I called off shipments, my average on hand last year being from six to ten cars.

I am rather inclined to think the public would also approve such a move and the dealers who started it, as a large majority of them will keep on running the old car rather than violate the law themselves. I have a number — such customers and the only tough thing is that they will not spend a penny except on absolutely necessary maintenance, knowing that when the fateful time comes to trade in their car, some dealer will give them as much for it as the top code figure despite its shabby condition.

As an alternative to the present code I would suggest that the dealer body, while in the saddle, force a closed territory provision on factories, guaranteeing each dealer kept, sufficient population and territory to operate his business, and keep the N. R. A. code book only as a guide to show the poor or unscrupulous dealer exactly how much

licking he is going to take before he takes the plunge. With this system he would either go out of business or reform and in either event he would not be the menace to other dealers that he is now.

The present system must be changed, the only alternative in prospect being to retire from business and leave the field to the gyps or else reduce the entire force to a skeleton organization and wait for the National Association and the Administration to realize the hardship they are imposing on honest dealers in territories where there are plenty of the other kind.

[fol. 303] I hope we don't have to wait as long as we did during Prohibition. In closing I wish to thank you for making this test case and express a hope for its success.

Yours very truly, David H. Jones.

[fol. 304] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN B. HULETT

STATE OF NEW YORK,
County of New York, ss:

John B. Hulett, being duly sworn, deposes and says:

That in this affidavit I am replying to the statements made in the affidavit of David B. Spielman verified the 28th day of August, 1934, submitted in reply to the defendant's affidavit herein in opposition to the motion made for a preliminary injunction to restrain the defendant from prosecuting the violation of the Code of Fair Competition for the Motor Vehicle Retailing Trade under the Schackno Act of the State of New York.

I call the Court's attention to the fact that in the said Spielman's replying affidavit a personal attack is made against all the affiants who submitted affidavits in opposition to the said motion to restrain. Such attack is not based upon actual facts but upon generalities and arguments unsubstantiated by actual fact. A reading of the affidavit will show the scurrilous appel-ations applied by the said Spielman against said affiants.

[fol. 305] I shall, however, attempt where necessary to concisely answer the said Spielman.

I shall hereafter mention by page number the pages of Spielman's affidavit without referring to the said affidavit in the future, so as to save repetition.

On pages from 1 to 6, both inclusive, an attempt is made to convince this Court that there are others in the industry who take the same position as the said Spielman with respect to the marketing rules of the Automobile Retail Code. No affidavits are submitted by any other affiants.

Reprints are made of alleged letters received by the Automotive Daily News from one R. H. Long, of Farmingham, Massachusetts, and by one M. H. Bury, of Philadelphia. Nothing in these reprints says anything with regard to the constitutionality of the Schackno Act or the said Code. An examination of the Automotive Daily News will show these letters, as well as other letters, were received by them by an invitation to the said dealers to express their opinions with respect to the operation of the trade provisions of the said Code. Mr. Spielman does not place before this Court those letters of dealers who are in favor of these provisions. Your affiant does not deem these two letters of sufficient value to call for the necessity of reprinting the letters of those who are in favor of the Code. These letters in Spielman's affidavit show the personal opinions of certain dealers.

[fol. 306] It is interesting to note that in Mr. Bury's letter he desires, in his fifth paragraph on the fourth page, a solution of the problems of the dealers by way of enforcement of the Code.

The letter mentioned on page 6 from David H. Jones, Incorporated, is a mere expression of opinion from a dealer. Apparently, this particular dealer, Jones, is not doing as good business as some of the other dealers in the metropolitan area, but it is interesting to note that in a letter signed by this same David Jones to Mr. Horace A. Bonnell, Code Administrator of New Jersey, 25 Branford Place, Newark, New Jersey, this letter written three days after Spielman's Exhibit A letter, he states in part as follows:

"In New York City recently a dealer was fined heavily and his name given wide publicity. Unless something like this is done here and soon it will be too late for the honest

dealers who are being driven out of business while what business there is goes to the gyps.

"We think it is up to you to justfy your position as Administrator by showing up some of the violators and giving them the publicity their conduct deserves."

Mr. Spielman's statement on page 6 that these three letters are sufficiently clear in themselves to sustain his position is an absurdity. The letters in themselves merely express personal opinions out of more than thirty thousand dealers, and even out of these three, at least two, in the last analysis desire strict enforcement of the existing Code.

In my twenty-five years of experience, in this industry, I found it difficult to exceed a net profit of 2% on my gross sales annually. I have found this to be the usual percentage of net profit made by other dealers, in normal times.

[fol. 307] In the face of this recognized situation, Spielman's statement that the complainant herein has lost in 1934, which is certainty not a normal year, one hundred thousand dollars in sales should focus light on the fact that at best, were Spielman's facts correctly stated, the complainant would lose at the most about two thousand dollars profits. Therefore, even if we assume that the broad and unsupported claim on the part of Spielman that he sustained a loss of one hundred thousand dollars in sales is correct, the actual dollars and cents loss which approximates $2,000.00 is hardly sufficient to warrant his extravagant charges that his business is being ruined and that he is being deprived of precious constitutional privileges. No tangible, definite or detailed evidence has been submitted to prove the truth of these statements made by Spielman.

The question as to the fairness of the average price allowance as provided for in the Code is taken up by the affidavits of Mr. Jack Frost, to which I respectfully direct this Court.

On Page 7, Spielman states that the complainant will be deprived of its property without due process of law because of the penalties provided in the Schackno Act, and then, in parentheses he states "$500.00 per day for each alleged violation." The amount of the fine in each instance of a violation is determined in any amount up to $500.00 by the trial Justice after conviction. The fine is not a con-

tinuing fine since a violation of the marketing rules of the Code is just a specific instance of a violation and is not a continuing violation. This effort to mislead the Court is present throughout Spielman's replying affidavit.

On Page 9, Spielman attempts to deny that the complainant admitted violating the price regulations of the Code. [fol. 308] To settle the point, I am setting forth in full, not in part as Spielman did, the "Twenty-First" paragraph of the complainant's complaint, which speaks for itself:

"Twenty-first: That by allowing customers and patrons of the complainant, actual, fair and honest values for used car trade-ins on the purchase of new automobiles, such prices being higher or lower than the 'average' purportedly fixed in the said official Guide, complainant after duly complying with all other provisions of the Motor Vehicle Retailing Code, makes a fair return and profit on its investment."

On pages 10 and 11, Spielman attempts to state that there are threats of prosecution on the part of the defendant against the complainant. There is no threat of a prosecution; the prosecution is presently pending. I deny the making of any threats.

The statement contained in Spielman's affidavit that it is immaterial whether the prosecution is based on discount or trade-in allowance as the price fixing result is the same is incorrect. The sales price of a new automobile is set by the factory which manufactures and sells the car to the dealer. The fact that a dealer may not sell a new car for less than list price as stated in the Code is a condition that the industry has always been more or less subject to in view of the fact that the franchise of the dealer usually depended upon his respecting the prices set by the manufacturer. The allowance made by the dealer for the used car traded in is usually the deciding factor in his profit or loss in the transaction.

Since the prosecution pending is one in which the complainant is charged with having sold a car at a discount. I have in my first affidavit submitted herein pointed out to the Court the fact that the used car provision of the Code is improperly before the Court. The new thought on page [fol. 309] 11, which does not appear on any of the original papers submitted in this proceeding is that there are now

pending threats of prosecution by me for sales involving trade-ins. No threats have ever been made by me or by my office against the said complainant that prosecutions will be instituted against it on sales made by it involving trade-ins. It may be that thereare other complaints against the complainant which involve trade-ins, but as I stated in my original answering affidavit, it is not my intention to institute any examinations or prosecutions against the complainant until its rights have been adjudicated in the present proceeding pending the Magistrate's court.

On pages 11 and 12, Spielman does not deny the truth of my statement in the first affidavit that the complainant opened two new branches of his business since January 1st, 1934, which may account for a great part of the increase in the complainant's payroll, as alleged by him.

I deny the statement set forth on pages 13, 14 and 15 with respect to the labor complaint that was lodged in my office. At no time did I urge upon Mr. Spielman to sign a legal document, if he desired "to avoid trouble". On the contrary, every opportunity was given Mr. Spielman, who raised a question as to the interpretation of the Code, to take the matter up with his counsel. In fact, in a letter subsequently received from the complainent, they called my attention to a question of the interpretation of the Code as to its labor provisions: whether or not they were violating the Code.

I do not, however, desire to take up the Court's time with something that is foreign to the issues involved herein. [fol. 310] The fact remains that the said letter of the complainant raising the question of the interpretation of the Code is in my possession.

I call the Court's attention to the general statements made on page 15 with regard to Spielman's attempt to convince the Court that he spoke at every trade meeting denouncing the provisions of the Code of Fair Competition; also the fact that no corroborating affidavits are submitted by him to substantiate this alleged fact.

I deny the statements made on pages 15, 16, and 17 to the effect that Spielman had considerable difficulty in securing from me the first Official Used Car Guide Book, listing used car prices. I had no books to distribute until one day prior to December 1st, 1933. As a matter of fact, I received one letter from the complainant dated December 1st, 1933, ask-

ing for the book. He receipted for two copies of the Guide Book on December 1st, 1933, which receipt is in my possession. Since the complainant received these books on the same day, his difficulty in securing the Guide Book seems to be exaggerated.

I deny the statements on pages 17 and 18 to the effect that the complainant and the Bushwick Decatur Motors, Inc. have been victimized. As a matter of fact, I have in my possession an admission of the violations charged, signed by an officer of the Bushwick Decatur Motors, Inc. This matter is now in the process of adjustment.

The Court will please note that on pages 18, 19, and 20, where reference is made up to a number of complaints made by the said complainant against other alleged violators, [fol. 311] only ten complainants are actually mentioned, although the complainant and Spielman have stated that they lost one hundred and seventy to one hundred and eighty sales because other dealers violated the Code and were therefore, successful in consummating the sales.

I respectfully call to the Court's attention the fact that affidavits of the purchasers mentioned on said list are not affixed to said affidavit.

I desire to apprise this Court of the following facts with regard to the list of complaints set forth in Spielman's affidavit:

With respect to the alleged complaint of Mr. Shore of the Gold Seal Button Works, 416 Marcy Avenue, Brooklyn, New York, who, it is alleged, purchased a car from the Bates Chevorolet Company in violation of the Code, I have no record of any such case being sent me.

With respect to H. Sternberg, we have a record of the purchaser's name given us by complainant as Harry Sternberg, 4403 Avenue I, Brooklyn, New York. Our investigation showed that this address is the residence of one, Louis Sternberg, who was interviewed. He stated he had no brother by the name of Harry, but that he did have a brother by the name of George. He refused to give either the business or residence address of the latter. He promised to have his brother stop in at our office. His brother never called to see us. We communicated with the alleged dealer who sold the car, the Prince Motors. We were, however, unable to get any information from Prince Motors, other than the fact that they sold a car to one Jerry Stern-

berg of 2207 19th Street, Brooklyn, New York. Our investigators called at 2207 19th Street, but could find no such address. We have no definite evidence of a violation. Our Inevstigating department is still endeavoring to trace this matter.

[fol. 312] With respect to the Metro Woolen Company, 7 Washington Place, New York, no dealer was mentioned to us. A report was shown and read by Mr. J. Gross of my office to Mr. Spielman personally which gave the history of the investigation. There is a possible violation here of a $6.00 over-allowance. This matter is receiving attention.

With respect to H. Q. Seidner, 401 Broadway, New York City, dealer, Brownsville Chevrolet Company, Spielman claimed the purchaser traded in a Willys-Knight for which he received an excessive allowance. Our investigation does not show this. Mr. Seidman, the purchaser, who is an attorney, wrote a letter stating that the Brownsville Chevrolet Motor Company had not violated the Code, but did state that Mr. Irving Spielman of the Spielman Motor Sales Co. Inc. agreed to give him a radio amounting in value to the sum of $59.59, free of charge if he would come back in two months.

With respect to "purchaser, Mr. Weinstein of the Dominion Dyeing Co., 83 Crosby Street, New York City, dealer, Bates Chevrolet," an investigation has been made and reveals no violation against the Bates Chevrolet Company.

With respect to M. Ladzin of 208 Bedford Avenue, Brooklyn, New York, an investigation has been made and no violation found.

With respect to I. Abramowitz, Stanto- —, New York City, purchaser—he claims he bought his — the Beacon Motors. He favored this concern because — -chased rugs from him.

With respect to Hamper & Co., Inc ., — New York City, I have no record of any such case — me.

[fol. 313] With respect to B. Rubner, 2101 Westb-, Brooklyn, the statement of facts given me by Spielman — -accurate and incomplete, no dealer being mentioned by — Spielman. This matter is in the hands of the investigator — further investigation.

With respect to Sidney Topel of 1635 Atlantic Avenue, Brooklyn, New York, dealer, Brownsville Chevrolet Co. an investigation has been made and no violation found.

I do not believe that Spielman can conscientiously urge that all these alleged sales which he claims were lost by complainant were lost because of any of the provisions of the Code.

I deny the statement that no action was taken by me or my office to investigate and determine whether or not violations were committed in the aforementioned cases.

According to Spielman, he reported only ten of the 170 to 180 cases in which he alleges he lost sales on account of violations by other Dealers.

I deny the insinuations made on page 21, that approximately one thousand dealers violated the Code. I refer the Court to my original affidavit with respect to this matter.

I deny the allegations set forth on pages 21, 22 and 23, that I have been administering the retail Motor Vehicle Code with the "administration of executive, judicial and legislative power much akin to that of a sovereign power"; that every means that could be devised of "human ingenuity was used to cud- members into this Association"; that I tried to "build up a but-cratic device that would perpetuate the officers of the Association in their respective positions, availing them of substantial income for their efforts." I have, on the other hand, tried to carry out the instructions of the State Advisory Committee.

[fol. 314] To the date of the making of this affidavit, nineteen violators have been held in the Magistrate's Court, and of them four have been tried and convicted in the Special Sessions Court for violations of the Code. It is not true that all of the others of the one hundred and twenty-five proven violations have been adjudicated or adjusted by me. Some have been adjusted and some are with the State Compliance Board of 45 Broadway, New York City, for approval to proceed with prosecution, and others are being prepared to be sent to 45 Broadway, for that office's consent to proceed with prosecution. Some few fines have been paid.

I deny the statement that the sums of money paid as fines amount to vast proportions and that this money has found its way into the "coffers of the Association subject to the use of its officers".

Apparently, said Spielman does not understand, or is not familiar with the rules governing the Code Authority.

A manual has been prepared by the National Recovery Administration, setting forth the procedure to which every Code Authority must adhere.

In accordance with the procedure outlined in this manual, conferences were had with the said complainant through its officer, Spielman, pursuant to a letter written by me to him concerning the complaint lodged.

I affix hereto an affidavit of Irene Keenan, my secretary, who denies the statements on page 23 to the effect that Spielman Motor Sales Co. Inc. was "in very serious trouble".

I deny the statements on page 23 that I advised Spielman that a "very serious violation had occurred", and that [fol. 315] unless the complainant signed an agreement to be bound by the findings of the Committee, a criminal prosecution would be commenced.

I have never threatened any of the dealers of the industry in their conferences with me to coerce them into a settlement. I have advised them of their rights in each instance, and reported to them the complaint submitted to me, and asked them to state their position.

Spielman's own statements on pages 23 and 24 confirm the fact that every opportunity was given the respondent, since he himself states that I suggested Spielman take a few days to investigate the matter.

I deny the statements set forth on page 24 to the effect that I had endeavored to entrap one of the complainant's employees and had "framed" one of his salesmen.

I keep minutes of these conferences and if the Court desires, I am prepared to submit the same to this Court. But at this time I desire to save the space necessary for reprinting since I do not think they are pertinent to the issue.

The conclusion reached by Spielman on page 24, that "this Association and its Commissioner has been using the Code and the N. R. A. as a vehicle for the advancement of their own pecuniary benefit" naturally fails in proven fact, and I deny this statement.

My finding that a violation has been committed does not of itself constitute me a judge and jury as to the facts, since if it must be approved by the State Compliance Board [fol. 316] the matter is then brought to the Courts for deter-

mination, which make the adjudication of guilt or innocence, and not I.

It is interesting to the Court to note that the Association to which Spielman refers has in the metropolitan area about nine hundred members, constituting a large majority of the Dealers in this Code District.

I deny the statements as alleged by the said Spielman on page 24 and 25 to the effect that I was proceeding improperly as Commissioner for the State Advisory Committee.

I herewith set forth in full a copy of a letter dated April 26th, 1934, sent to Theodore Southworth, Chairman of our State Advisory Committee, by the National Recovery Administration of 45 Broadway, New York City, as well as a copy of a letter forwarded to me, dated April 26th, 1934:

National Recovery Administration

45 Broadway, N. Y.

April 26th, 1934.

Mr. Theodore Southworth,
250 West 5th Street,
New York City.

DEAR MR. SOUTHWORTH:

Confirming the understanding reached at the meeting last Monday, I wish to inform you that the State Committee of the Motor Vehicle Retail Trade is authorized to handle Trade Practice complaints in the first instance. I have had this authorization confirmed in Washington. It is not authorized, however, to handle Labor Complaints except on reference from this office, when such reference is made by the Labor Compliance Office.

Very truly yours, (Signed) Robert K. Straus, Special Assistant to General Johnson.

RKS:hb.

[fol. 317] National Recovery Administration

Office of State Director, National Emergency Council
45 Broadway, New York City

Mr. J. B. Hulett, April 26, 1934.
Motor Vehicle Retailing Code Authority,
250 West 37th Street, New York.

DEAR MR. HULETT:

In accordance with the conversation between Mr. Robert Straus, yourself, and myself, held in this office today, it is

felt that the payment by the Respondent to the Complainant of a sum equal to the profit which the Complainant would have received if he had not lost the business to the Respondent, would be a very fair method of adjustment of all trade practice complainant wherein one dealer succeeded in depriving another of business through violation of the Code.

We do not feel however, that any charge should be made to cover the costs of the development or procedure of the case by the Code Authority, or its agents.

Very truly yours, (Signed) Lammot Du P. Copeland, Acting Trade Practice Compliance Director.

C:MS.

These two letters were the culmination of the question raised in the National Recovery Administration's Office as to whether my procedure was proper.

I deny most emphatically the statement on page 25 that I have made a deliberate attempt to mislead this Court by my statement in my original affidavit to the effect that I was not the moving factor in arranging the pending action against the complainant by the defendant. The fact is that this was brought about through the local Brooklyn Association of which the said complainant is a member. The procedure adopted by me when I first interviewed complainant was in pursuance of the said manual of the National Recovery Administration.

[fol. 318] I deny the statements set forth on page 25 to the effect that more than one hundred retail dealers have frankly expressed their thoughts that the price regulatory provisions of the Code are unworkable. The statement in itself is general and the names of these dealers are not mentioned, which makes the statement inconsequential.

I further state that at no time have I been apprised that any of the dealers have stated that they were in fear of what might happen to them if my alleged wrath as Commissioner were incurred against them. This is only another extravagant statement unsubstantiated by any facts.

I deny the statements set forth on pages 26 and 27 to the effect through insinuation that seven hundred and fifty dealers were approached for affidavits and only fifty-seven gave their affidavits. As a matter of fact all the affidavits were procured, only on the 14th and 15th days of August, 1934, in a period of twenty-four hours. The men who procured the affidavits are the following:—George E. Porter, H. V. Flan-

nery, John G. Gross, Gerald Foley, L. Wessels. Their method of obtaining these affidavits is set forth in their affidavits annexed hereto and made part hereof. The Court can well see that it would have been a physical impossibility for these men, working in pairs, to have covered seven hundred and fifty dealers in the local metropolitan area in said period of time.

The general conclusion reached by Spielman on page 26 that these fifty-seven affidavits were executed in alleged fear of the Commissioner, and that these affidavits contain rank falsehoods only again shows the reckless manner in which the complainant makes statements.

[fol. 319] An examination of the date of the verification of the various affidavits will prove the facts stated by me as to when these affidavits were procured.

I wish to point out to the Court at this time that when a statement is made by me, I am able to procure substantiating affidavits because of the truth of the statements therein contained.

I deny the statements contained on pages 26 and 27 to the effect that a special investigator, name unmentioned, was sought by me to be used for the express and sole purpose of tracing down every one of the complainant's contracts and that this unnamed investigator refused employment. As a matter of fact, I made no such statements to any of my investigators, or to anyone that sought employment with me as an investigator.

I deny the statements on page 27 with regard to the alleged purchaser, Gabriel Cohen, who was interrogated by two of my investigators, John Gross and Borror. The affidavit of John Gross annexed hereto and made part hereof is in denial of the statements made with reference thereto.

I deny the allegations as stated on page 28 and state that all investigations made by me are made in pursuance of the enforcement program of the N. R. A., which includes the protection of the public.

Although this is irrelevant to the issue involved, I wish to call the court's attention to the fact that in January of 1934, a majority of the Chevrolet dealers in this Code district requested that they be permitted to use a handling charge of $28.50 in computing the delivered prices of Chevrolet automobiles in this Code District, in accordance with [fol. 320] Paragraph 1, Subsection B, Article IV, of the

Code of Fair Competition for the Motor Vehicle Retailing Trade, which charge I approved.

Subsequently, the Chevrolet dealers presented a petition signed by a majority of them to reduce this handling charge, which reduction I accordingly approved.

Since all this took place at the instance of the dealers themselves, and since I have no power to arbitrarily fix any handling charges, the Court will see that the statements made by the said Spielman are ill-founded in truth and fact.

I call the Court's attention to the replying affidavit of Ralph Ebbert, annexed hereto and made part hereof, which affidavit responds to the allegations set forth on pages 29 to 32 inclusive and part of 33.

With respect to the statements on pages 33 to 41 inclusive, referring to the affidavit of Hiram Bates Pope, I might say that an examination of the said affidavit and the reply made thereto by the said Spielman merely shows that Spielman again expresses his personal opinion of what Mr. Pope set forth in his affidavit, and some more unfounded deductions.

It is interesting to note the following statements which appear on page 38:

"• • • While it is true that the improvement from the year 1933 to 1934 was exceptional, the industry, by no means has returned to normalcy."

The foregoing statement is just another illustration of the inconsistency of Spielman's statements. While in other parts of his affidavits, he complains bitterly that the industry [fol. 321] cannot survive with the Code in operation, here he admits that there is an improvement in business in the year 1934; and this, notwithstanding the fact that the very Code which he objects to is in operation.

Spielman concludes on pages 42 to 48 inclusive, in reply to the affidavit of Mr. Oscar A. Pearson, that Mr. Pearson had created a wrong impression. I fail to find any letter or affidavit by the said Mr. Pearson annexed to Spielman's papers to show any error made by him, or to correct what he has heretofore averred.

With respect to Spielman's statements appearing on pages 46, 47, 48 and 53, concerning statements allegedly made by Alvin McCauley, president of the Packard Motor Company, I wish to state: that in the past there has been a tendency for Dealers in the high priced automobiles to al-

low more for a given used car than could be allowed on the purchase of a cheap car, and in some cases, the list prices of new cars have been kept up by the Manufacturers to provide a greater margin of profit to cover these larger allowances. On this account, with the advent of controlled used car allowance prices, some manufacturers found it difficult to sell their product without over-trading, and, accordingly, found it necessary to reduce their list prices. To use the case in question for example,—Packard list prices were reduced on June 21st, 1934, in amounts ranging from about $380.00 to about $1200.00 per car. This tendency to price new automobiles in accordance with their real value is, of course, beneficial to the buying public.

I further wish to state that the complainant deals in the sale of new Chevrolet cars. Since the Chevrolet car is a low priced car, his reference to high priced cars is foreign to the issue involved in this matter.

[fol. 322] I deny the statements set forth on page 48 that the increase of new car sales in June and July, 1934, has been caused by the alleged flagrant violations of the Code. There is no evidence submitted substantiating this general statement, as well as the other statements following on the same page.

With reference to the statements made in reply to the affidavit of Harold H. Straus, my affidavit hereinabove has dwelt on Spielman's allegations of arbitrary fixation of prices for the sale of new cars, and has covered the situation as to whether I threatened action against the complainant on other violations.

In connection with the statements made in reply to the affidavits of the fifty-seven dealers at pages 50 to 61 inclusive, the Court will please note the fact that these fifty-seven affidavits were all procured within twenty-four hours, as heretofore explained, which fact speaks for itself.

I doubt that Spielman spoke to more than one hundred dealers and that all with but one exception condemned the operation of the Code (Page 51 of his affidavit).

I deny that any inducement was given by me, or my office, to have the aforesaid affidavits signed by the various affiants.

I respectfully call the Court's attention to the affidavit of J. E. Kopel, as well as the affidavit of Stephen Bayers of the Bayers' Chevrolet, whose names are mentioned on

page 51, which affidavits are annexed hereto and made part hereof.

The statements on pages 52 and 53 with regard to the used car dealers are not sound. There is no question that the used car dealers have benefited by the stabilization of used car prices. Formerly, their business was a "hit and [fol. 323] miss" business. Now, the market values of used cars are available to them.

With regard to procuring affiants as stated on page 54, the method of doing so is explained by the investigators hereinbefore mentioned, whose affidavits are submitted herewith, and made a part hereof.

With respect to the Ford dealer mentioned on page 54, and the statements therein contained, it is interesting that the name of this dealer is not mentioned, nor is there an affidavit attached to substantiate the statements made.

The analysis by Spielman of the contents of the fifty-seven affidavits as set forth on pages, 55, 56 and 57, constitutes Spielman's opinion.

In further response to the statements contained on pages 57, 58, 59, etc., I have received certain resolutions passed by Union Auto Trade Association and New Jersey Automotive Trade Association, annexed hereto and made part hereof, marked Exhibits "A" and "B" which show, contrary to the opinion of the said Spielman, that the majority of those engaged in the industry in New Jersey are in favor of the Code and the used car Guide Book.

It is interesting to note that notwithstanding all the arguments of the said Spielman, he admits that "there can be no question but that adherence to the President's Recovery program would have occasioned an increase of employment and the reduction of the hours of each employee". This statement clearly points out the inconsistency of the said Spielman.

The statement on page 59 that if the Code were enforced [fol. 324] the dealer would make a "high exorbitant profit by complying with the Code, merely proves even to the understanding of the said Spielman that the Code is for the benefit of the dealers. But realizing that this admission would be harmful to him, he terms the profit "high" "exorbitant" without submitting any facts or figures in support of such contention.

It is interesting to note how thoroughly familiar Spielman seems to be with the methods that may be employed by

dealers who conspire to violate the Code, as set forth on page 60.

I deny, as stated on page 60 that:

"non-compliance is prevalent and there is hardly a dealer that has not in some instances allowed discounts or trade-in allowance in excess of Code provisions."

I further definitely deny that violation is more common than compliance.

In conclusion, I aver that the statements contained in the complaint, affidavits in support of the complainant's motion, and the replying affidavits submitted by the complainant, furnish factually no evidence of probative value to sustain the application of the complainant for a preliminary injunction, or for the relief prayed for in the complaint, and I, therefore respectfully renew my prayer for a denial of the said application for a preliminary injunction, and ask for a dismissal of the complaint.

JOHN S. HULETT.

Sworn to before me this 8 day of September, 1934. G. L. Schultgendorf, Notary Public.

[fol. 325] EXHIBIT "A" TO AFFIDAVIT

Union Auto Trade Association
119 East 5th Street
Plainfield, N. J.

Telephone 6-4755

Resolution Adopted by the Union Auto Trade Association at the Last Regular Meeting, Held Aug. 13th, 1934, at Elizabeth, N. J.

Whereas: The vast majority of the members of the Union Auto Trade Association, an association of 73 new car dealers, have individually gone on record as being definitely in favor of the Motor Vehicle Retailing Code and the used car Code Book as a means for creating better business conditions and practices in the Automobile Retailing Industry and,

Whereas: The evidence as indicated by the small number of reported violations and subsequent investigations in the trade area served by the Union Auto Trade Associa-

tion shows excellent dealer compliance, and in most instances investigation has proven that violation was not willful, but purely technical, and,

Whereas: Report by member dealers of the Union Auto Trade Association indicate that, on the whole, customers are receiving better allowances on used cars and dealers are receiving more equitable sale prices that they did prior to the adoption of the code,

Therefore, Be it Resolved, that the statements appearing in the issues of August 3, 1934 of the New York Herald Tribune and the New York Times, reported to have been made by David Spielman, President of the Spielman Motor Sales Company, Inc., of New York are erroneous and misleading in so far as the dealers of Union and Somerset Counties are concerned and are in conflict with the best interests of the Automotive Dealers and the National Recovery Program. The specific statements referred to are those to the effect that:

1. "* * * more than 90% of all dealers are openly and flagrantly violating the code."

2. "* * * the maximum prices (as listed in the Code book) deny prospective purchasers an honest and true value for used car trade-ins."

Union Auto Trade Association,
Halsey S. Mills,
Secretary.

Sworn and subscribed before me this 5th day of September, 1934, as being a true copy.

Clara L. Archbald, Notary Public of New Jersey. My commission expires Jan. 7, 1936.

[fol. 326] EXHIBIT "B" TO AFFIDAVIT

New Jersey Automotive Trade Association

421 Cleveland Avenue,
Plainfield, N. J.

Phone, Plainfield 6-1200

Resolution Adopted by the New Jersey Automotive Trade Association at the Last Regular Meeting Held August 15, 1934, at Trenton, New Jersey.

Whereas: The vast majority of the members of the New Jersey Automotive Trade Association have individually gone on record as being definitely in favor of the Motor Vehicle Retailing Code and the used car in the Automotive Retailing Industry and,

Whereas: The evidence as indicated by the small number of reported violations and subsequent investigations throughout the State shows excellent dealer compliance, and in most instances investigation has proven that violation was not willful, but purely technical, and

Whereas: Report by member dealers of the New Jersey Automotive Trade Association indicate that, on the whole, customers are receiving better allowances on used cars and dealers are receiving more equitable sale prices than they did prior to the adoption of the code,

Therefore: Be It Resolved, that the statements appearing in the issues of August 3, 1934 of the New York Herald Tribune and the New York Times, reported to have been made by David Spielman, President of the Spielman Motor Sales Company, Inc., of New York are erroneous and misleading in so far as the dealers of New Jersey are concerned and are in conflict with the best interests of the Automotive Dealers and the National Recovery Program. The specific statements referred to are those to the effect that:

1. "• • • more than 90% of all dealers are openly and flagrantly violating the code".

2. ". . . .the maximum prices (as listed in the code book) deny prospective purchasers an honest and true value for used car trade-ins."

W. J. Regan, President.

Sworn and subscribed before me this 5th day of September, 1934 as being a true copy.

Clara L. Archbald, Notary Public of New Jersey. My commission expires Jan. 7, 1936.

[fol. 327] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RALPH EBBERT

STATE OF NEW YORK,
County of New York, ss:

Ralp Ebbert, being duly sworn, deposes and says:

That I am the manager of the Brooklyn Motor Vehicle Dealers Association, as well as the Brooklyn & Long Island Automobile Dealers Association.

That I have read the replying affidavit of David B. Spielman to the affidavit which I submitted in opposition to the motion for a preliminary injunction against the defendant in the above entitled matter, which was verified by me on the 15th day of August, 1934.

That I am submitting this affidavit in reply to the said Spielman's affidavit and in support of my original August 15th affidavit submitted herein.

This Court should ignore the insinuations made by the said Spielman in his said affidavit on page 29, that my personal sentiments were contrary to the facts stated in my [fol. 328] said affidavit of August 15, 1934.

I deny the said Spielman's statements therein and affirm that our two associations, of which I am manager, are separate and independent organizations and are not ruled and dictated by Mr. J. B. Hulett.

Mr. Spielman has confused the meeting mentioned in my affidavit of August 10th at the Hotel St. George with another meeting at the Hotel St. George held on October 18, 1933, at which time pledges of compliance and endorsement of the Code of Fair Competition for the Motor Vehicle Retailing Trade were distributed.

This October 18th, 1933, meeting was not held by our association but was called at the instance of Theodore Southworth, as chairman of the Metropolitan State Advisory Committee.

At the August meeting preliminary codes were presented to the meeting but no pledges were distributed to the members for signature since the code had not been put into effect. The Code was approved by the President on October 3, 1933.

From a reading of Mr. Spielman's statements on page 30 of his affidavit, the fact is proven that he did not take the floor in the meetings mentioned in my affidavit of August 15th, 1933, prior to the adoption of the Code to state his views thereon. He states that "although frankly I did not endeavor to secure the floor."

[fol. 329] I therefore reaffirm what I stated in my affidavit of August 15, 1934, all to the effect that prior to the adoption of the Code the said Spielman and/or the complainant did not take any recognized positions at the meetings mentioned, and certainly made no protest to the proposed codes.

I deny that in any conversations that I have had with Mr. Spielman have I said there was considerable merit to Mr. Spielman's position in this litigation.

Ralph Ebbert.

Sworn to before me this 6th day of September, 1934.
Jerome H. Brill, Notary Public.

[fol. 330] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EZIEL KOEPEL

STATE OF NEW YORK,
County of New York, ss:

Eziel Koepel, being duly sworn deposes and says:

I am President of E. Koepel Inc., Chrysler and Plymouth automobile dealers located at 162-19 Hillside Avenue, Jamaica, Long Island.

I have read that part of the reply affidavit of David B. Spielman verified August 28, 1934 which refers to a conversation he had with me and allege statements that I made to him, more specifically contained on Page 51 of said Spielman's reply affidavit.

I emphatically deny that I made any of the statements Spielman alleges I made.

What actually did occur was as follows:

The said Spielman called at my place of business a month ago and showed me an affidavit which he wanted me to sign.

Since the affidavit condemned the Code, I refused to sign it. I told him that my business had benefited greatly by operation of the Code; that under the Code the dealer was able to conduct his business at a profit; that by virtue of the salutory provisions of the Code, for the first time in the twelve years I have been in business as an automobile dealer, I have been able to make profits on many used cars which I had taken as trade-ins upon the purchase of new [fol. 331] automobiles and in the case of the remaining automobiles which I took as trade-ins since the Code went into effect I suffered no loss; that the benefits accruing the dealer under the Code were many and the only salvation of the dealers was the continued operation of the Code; that it was very foolish of any dealer not to live up to something they had been fighting for twenty years to obtain, in other words some regulation permitting the operation of business at a profit.

Eziel Koepel.

Sworn to before me this 7th day day of September, 1934.
Jerome H. Brill, Notary Public, Bronx County. Bronx Co. Clk's No. 138 Reg. No. 59 B 36; N. Y. Co. Clk's No. 750 Reg. No. 6 B 422; Kings Co. Clk's No. 232 Reg. No. 6310; Commission expires March 30, 1936.

[fol. 332] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF STEPHAN BAYERS

STATE OF NEW YORK,
County of New York, ss:

Stephan Bayers, being duly sworn, deposes and says: That he is president of Bayers Chevrolet Co., Chevrolet automobile dealers located at Steinway Street in Long Island City, New York.

That he has read that part of the reply affidavit of David B. Spielman, verified the 28th day of August, 1934, which refers to deponent, more particularly on pages 51 and 52 of said affidavit.

Deponent is amazed at the statements contained therein and emphatically denies same.

The sum total of deponent's contact with said Spielman was a telephone conversation had with him. Spielman asked deponent to sign an affidavit to the effect that deponent was opposed to the Code. This deponent refused to do. Deponent stated that the Code was a wonderful thing for the dealers, and that deponent was for the Code 100%.

Stephan Bayers.

Sworn to before me this 7th day of September, 1934.
Jerome H. Brill, Notary Public.

[fol. 333] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF IRENE KEENAN

CITY AND STATE OF NEW YORK,
County of New York, ss:

Irene Keenan being duly sworn deposes and says:

That she is employed as Secretary to John B. Hulett, Commissoner for the Metropolitan New York District for the New York State Advisory Committee for the Motor Vehicle Retailing Trade Code.

I have read that part of the reply affidavit of David B. Spielman verified August 28, 1934 which refers to me more particularly on Page 23 thereof.

I deny that I ever told the said Spielman that the complainant herein Spielman Motor Sales Co. Inc. "was in very serious trouble".

I aver emphatically that I never made any such statement.

(Signed) Irene Keenan.

Sworn to before me this 8th day of September, 1934.
Jerome H. Brill, Notary Public, Bronx County. Bronx Co. Clk's No. 138, Reg. No. 59B36; N. Y. Co. Clk's No. 750, Reg. No. 6B422; Kings Co. Clk's No. 232, Reg. No. 6310; Commission expires March 30, 1936.

[fol. 334] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN G. GROSS

STATE OF NEW YORK,
County of New York, ss:

John G. Gross being duly sworn deposes and says:

That I reside at 20 East 76th Street, in the Borough of Manhattan, City of New York.

That on or about June 13, 1934 at about 1 P. M. in the company of one Millard F. Borror who resides at 112-12 Myrtle Avenue, Richmond Hill, County of Queens, State of New York, I called upon one Gabriel Cohen at premises at 30 Broad Street, Borough of Manhattan, City of New York in order to investigate a complaint against Spielman Motor Sales Co. Inc. in which the said Cohen was the purchaser of an automobile.

I have read the affidavit of the said Gabriel Cohen verified the 28th day of August, 1934 which is annexed to the reply affidavit of David B. Spielman herein.

I deny emphatically that either I or Mr. Borror at any time stated to the said Cohen that "there have been numerous complaints lodged against Spielman Motor Sales Co. Inc. with the Code authority" as alleged in the said Cohen's affidavit.

I also deny that at any time did we admonish or warn the said Cohen that if he did not sign a statement as to the facts of his transaction with Spielman Motor Sales Co. Inc. he would be compelled to appear as a witness if crim-
[fol. 335] inal action were taken on this transaction.

I deny that either Mr. Borror or I at any time in our conversation with the said Cohen cast any reflections upon the name of Spielman Motor Sales Co. Inc.

I aver that all that happened was that Mr. Borror and I wrote down the facts of the transaction in which the said Cohen purchased an automobile from Spielman Motor Sales Co. Inc. and requested the said Cohen to sign a statement of the facts. This request was made of Mr. Cohen in order that we might have a record of his version of the transaction. Neither Mr. Borror or I at any time warned or

admonished the said Cohen in order to induce him to sign said statement.

Upon his refusal to sign the said statement we left.

(Signed) John G. Gross.

Sworn to before me this 8th day of September, 1934.
Jerome H. Brill, Notary Public, Bronx County. Bronx Co. Clk's No. 138, Reg. No. 59B36; N. Y. Co. Clk's No. 750, Reg. No. 6B422; Kings Co. Clk's No. 232, Reg. No. 6310; Commission expires March 30, 1936.

[fol. 336] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOUIS H. WESSELS

STATE OF NEW YORK,
City of New York,
County of New York, ss:

I, Louis H. Wessels, being duly sworn depose and say; that on August 14th, J. B. Hulett, Administrator of the Motor Vehicle Retailing Code of Fair Practice of Metropolitan New York, instructed me to proceed to my territory, counties of Westchester and Rockland *County* in New York State, and visit as many dealers as possible during the following day and to secure from the dealer voluntary signature to an affidavit to the effect that it was their desire that the existing Automobile Code be continued.

On that day, the fourteenth, I secured four affidavits in Rockland County, working that evening. On the following day, the fifteenth, traveling by motor car and covering in all approximately one hundred and twenty-five miles, secured affidavits for the balance, to wit; twenty-five, a total of twenty-nine, finding executives in almost every instance, and after reading did willingly, and in some cases eagerly sign the affidavit which I placed before them, realizing as they did that the affidavit as presented was absolutely true and that should the Code be eliminated it would mean a return of the old cut-throat method of doing business, and in a good many instances a total elimination of a number of dealers who voiced their opinion in no uncertain terms,

such as "when the Code goes out, I go out", "should this Code fail, I'll put the key in the lock", and "I don't see why after waiting twenty years for just this very thing to happen and it drops into the dealers' laps, why some of these birds are trying to kill it", is putting it very mildly as to the feeling existing among dealers in the area of this office.

It so happened that the twenty-nine aforementioned affidavits was all that I had with me, and could have secured double and yes, triple the number had it been physically possible to do so in the limited time that of one day. A number of the dealers I visited in this territory were either away on vacations or away for the day. When I found a dealer out I left the document with a request to read and [fol. 337] sign if he desired to do so, and picked it up later in the day, signed. Only in one instance did I find a dealer who refused to sign it, and he only would I am quite sure sign, had I been willing to wait and enter into a lengthy discussion with him regarding it, and because of the time limit and for that only, I refused to do so, inasmuch as my orders were to return the complete affidavit to the office on the evening of the fifteenth, and at no time, if the dealer was not in accord with the wording of the affidavit, were they asked to sign. In fact they were told that they did not have to sign if they did not wish to do so, and that no pressure or influence of any sort was used in asking the dealers to sign this document.

(Signed) Louis H. Wessells.

Sworn to before me this, 6 day of Sept. 1934. G. L. Schutzendorf, Notary Public, Nassau Co. #1685, N. Y. Co. #1196.

[fol. 338] In United States District Court

Affidavits of G. E. Porter and H. V. Flannery

State of New York,
City of New York,
County of New York, ss:

G. E. Porter and H. V. Flannery, being duly sworn deposes and says; that in the evening of August 14th, 1934,

J. B. Hulett, Administrator of the Motor Vehicle Retailing Code of Metropolitan New York, instructed them to proceed the following morning into the Queens County territory, and there visit as many dealers as time would permit during that day, and to obtain from those dealers their voluntary signature to an affidavit, in substance, to the effect that they desired the continued existence of the Automobile Code.

Deponents further say, that from about 9 A. M. in the morning of August 15th, 1934, to about 7 P. M. of the same day they covered, in an automobile, distance approximating eighty miles, visiting in the Queens County territory the stores of thirty dealers, and finding officers in only twenty-three of them; that twenty of the dealers executed the affidavits placed before them, their consensus of opinion being that the meaning contained in the said affidavit was absolutely true, and that in the event the Code was eliminated it would mean the return of very difficult times for the dealer; that the visit to each dealer averaged about ten minutes, and that two of the three dealers, who did not execute an affidavit, desired that they be given a little time to discuss it with other members of their company, but which we told them we could not favor because we were instructed to return the completed affidavits to the office that evening.

Deponents further say that upon their arrival at each dealer's store they requested that the dealer read the affidavit, and that if not in agreement with the wording of it to be sure to say so, that they were not expected to sign anything with which they were not in accord; that we had only a few minutes to spend with him for we were forced [fol. 339] to cover a lot of territory during the day; that in our visits to the several dealers no pressure or influence of any nature whatsoever was manifested by us, and that in several cases dealers wanted to discuss some violation in their territory, but by reason of our time being limited we assured them we would return and talk over with them the other subjects which they had in mind.

Deponents further say that the enthusiasm on the part of the dealers to defend any possible loss of the Code to them was inspiring, and it would appear from their quick reaction that they would vigorously oppose any attempt to deprive them of a vehicle that is gradually returning

the automobile industry to its original high rank in the field of industry.

Deponents further say that if more time had been available they could undoubtedly have obtained assent from more than 85 per cent of the additional dealers, and that this statement is based upon the warm interest of those dealers from whom affidavits had already been obtained.

(Signed) George E. Porter; (Signed) H. V. Flannery.

Sworn to before me this 5 day of Sept. 1934. G. L. Schutzendorf, Notary Public, Nassau Co. #1685, N. Y. Co. #1196.

[fol. 340] In United States District Court

Affidavit of John G. Gross and Gerald Foley

State of New York,
County of New York,
City of New York, ss:

I, John G. Gross, and I Gerald Foley, being duly sworn depose and say that on the afternoon of August 15th, 1934, J. B. Hulett, Administrator of the Motor Vehicle Retailing Code of Metropolitan New York instructed us to proceed the following morning through Kings and New York Counties calling upon as many dealers as time would permit in an effort to obtain from these dealers their voluntary signatures to an affidavit substantially that they desired the continued existence of the Motor Vehicle Retailing Code. From about 9:00 A. M. to 6:00 P. M. on August the 16th, we called on twenty-eight (28) dealers. Of these twenty-eight (28) dealers seven (7) were not in, five (5) either could not or would not sign the affidavit and sixteen (16) did sign. Of these sixteen (16) nine (9) signed on August 20th and in the other seven (7) cases, it was necessary to leave copies for dealers to take up with their partners or to think over. However, all seven (7) signed the following day, August 17th, 1934.

We instructed all dealers visited to read the affidavit closely, and that if they could not honestly sign it, not to do so. There was absolutely no coercion or even persuasion

on our part to obtain signatures. The attitude of all dealers was that the Code was a good thing and they expressed their desire for stricter enforcement. This was even true in the cases of the dealers refusing to sign.

Sworn to before me this 7 day of Sept. 1934. G. L. Schutzendorf, Notary Public, Nassau Co. No. 1685, N. Y. Co. #1196.

Signed: John G. Gross
Signed: Gerald Foley.

[fol. 341] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JACK FROST

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Jack Frost, being first duly sworn, deposes and says: That I am the assistant to Mr. F. W. A. Vesper, President of the National Automobile Dealers Association. Said Association being the duly authorized Association for compiling and publishing the Official Guide Book referred to in the Code of Fair Competition for the Motor Vehicle Retailing Trade. I have heretofore executed and filed an affidavit in the above-entitled matter. This affidavit is executed in answer to complainant Spielman's affidavit and analysis of my previous affidavit. I have made no attempt herein to touch all the various argumentative statements in complainant's affidavit. I hereinafter set forth some of the vital discrepancies which I deem pertinent in this matter.

[fol. 342] Page 76 of Mr. Spielman's analysis of the Affidavit of Mr. Frost states:

"I challenge Mr. Frost to suggest any method * * * to correct inequalities or inequities * * *"

Mr. Spielman is a member of the National Automobile Dealers Association. He has been sent all of the bulletins of that Association since his membership was put in force. Mr. Spielman has also received various communications from the New York State Advisory Committee offices. The

information thus supplied has kept Mr. Spielman fully informed of the structure of the Code enforcement and administrative organization. He therefore knew that he had open to him and all other dealers, the privilege of taking his complaints to first, the properly elected State Advisory Committee, second, to the properly elected National Emergency Committee, and third, to the National Control Committee, and should he have chosen to go outside of the industry's administrative organization, he had the right of direct appeal to the National Recovery Administration officials at Washington. It is significant, therefore, that Mr. Spielman has never communicated with the National Control Committee at any time prior to his filing of this complaint, and furthermore, it is significant that he could not find the time to appear at Washington throughout the many months that the Code has been in effect. Oral objections he claims to have raised have never come to the attention of either the National Emergency Committee, the National Control Committee or even the National Automobile Dealers Association prior to his filing of this complaint.

Page 78 of Mr. Spielman's analysis * * * states:

"* * * Mr. Frost characterizes the practice of trading in automobiles as the vice of the industry * * *"

"On page 16 of my Affidavit I use the words "vice" and "trouble," but it must be noted that this paragraph continues into page 17. Herein it is explained that the "over allowance" and the "allowance errors" are the root of the trouble which in the end brought various results. A proper [fol. 343] handling of the used car can place this department of the industry on a business-like basis and permit it to function as an enterprise which can keep faith with consumer interest. In my affidavit an explanation is offered showing the development of this phase of the business which in the end became a major factor for consideration in the writing of fair trade practices in this industry.

On page 78 of Mr. Spielman's analysis, he quotes from a letter addressed by himself to Administrator K. J. Ammerman of the National Recovery Administration. A reading of this letter indicates conclusively that Mr. Spielman's objection was pointed at the element of non-enforcement of these price regulations, but positively makes no definite objection to the marketing rules or price regulations as such. He refers to his experience stating, "That the non-

enforcement of these price regulations has been an ideal smoke screen for an unscrupulous dealer to work behind * * *" No direct objection to the regulation is made in any fashion whatever.

Page 78 of Mr. Spielman's analysis * * * states:

"I cannot understand the significance of these remarks, the figure 21% is cited * * *"

Here Mr. Spielman endeavors to point out a discrepancy between my reference to the 21% found through the National Recovery Administration analysis of five hundred automobile dealers' handling and reconditioning costs.

It should be noted that in my reference to the 21%, I distinctly state * * *, "It was found that the average cost of these five hundred dealers amounted to 21% for handling and reconditioning the used cars"

This reference is connected with my analysis of the reconditioning expense and an attempt is made here to prove that one group of percentages belies the other. The reference to 21% includes both the cost of reconditioning and the [fol. 344] cost of handling. The cost of handling is that cost in the nature of commissions to salesmen, salaries, rent, lights, advertising, etc., which the dealer pays for the operation of his used car department. Reconditioning expense is distinctly that which is applied to the used motor vehicle in the nature of repairs, adjustments, etc., preparatory to its resale by the dealer.

The addition of reconditioning expense percentages to operating expense percentages brought out the figure 21% referred to in the analysis made by the National Recovery Administration. In this same discussion Mr. Spielman refers to these percentages and asks the question * * * "21% of what?"

The percentages referred to are applied to the sales price of the used cars handled. When the total dollar volume of used car sales is considered against the total amount of handling and/or reconditioning expense, these percentages are the result referred to in my affidavit.

Page 79 of Mr. Spielman's analysis * * * Mr. Spielman states that there are 45,000 automobile dealers in the United States. His figure of 45,000 is very inaccurate and definitely inflated. The Code Authority of the Motor Vehicle Retailing Trade can supply the court with the best recog-

nized list of the number of new car dealers in the United States.

Mr. Spielman refers to the analysis of five hundred dealers being an inadequate analysis. This analysis could be continued over many thousands of dealers and I am able to assure the court that the result in percentages would change only slightly.

Mr. Spielman strictly avoids challenge of the analysis made by the National Automobile Dealers Association of reconditioning expenses wherein I compare those percentages to the mandatory Code deductions. Since he realizes that the Association is fully equipped with the best information of this type available to the industry, it should be noted that over 150,000 used car sales were analyzed in the de- [fol. 345] velopment of these percentages. It is therefore true that the Code does fix too low a figure for mandatory deductions when the costs of reconditioning and operating expenses are added together.

Page 81 of Mr. Spielman's analysis of the affidavit • • •

Mr. Spielman here refers to my affidavit concerning the condition of this industry at the time this Code was written, and also refers to the position in which salesmen found themselves.

The voice of no less than twenty-five to thirty thousand dealers will sustain my contention that salesmen had become discouraged since their natural function of developing and closing business had been so impaired through the evil of over allowances.

Furthermore, the same voice of this great industry quickly proves that Mr. Spielman is quite alone with a definite and small minority when he states that the financial condition of the automobile dealers of this nation was virtually one in which only twenty percent were on the verge of insolvency. Irrespective of the effects of the depression, the business of automobile retailing would have unquestionably come to this same point almost as soon if — had not some business-like basis for treating with the used car problem been reached.

Mr. Spielman offers no concrete rebuttal of this statement other than the voicing of his own opinion. It should therefore be noted that if this Code were not necessary, and if the dealers of this nation did not want this Code, similar complaints to Mr. Spielman's would have been

brought before the courts of this country by the thousands, and, brought many months ago.

The National Automobile Dealers Association can supply, if given a period of two weeks within which to request the information, affidavits from no less than twenty-five thousand automobile dealers, and from every section of the United States, which affidavits will clearly state that this Code is a necessity to the business of automobile retailing, and it is their wish and demand that it be enforced.

[fol. 346] On page 82 and Page 83 of Mr. Spielman's analysis . . .

Here Mr. Spielman broadly refers to the effects of the depression on the automobile retailing industry. He adroitly avoids the pertinent points in my affidavit concerning the effect of over allowance and vicious trading practices which forced selling below cost. His reference to the relation of banks to automobile dealers: He compares the department stores adjustment of sales prices to that forced adjustment effected through the trading in of used cars. It is interesting to note that the department stores adjust the selling price of their new merchandise, and likewise do the automobile manufacturers adjust the selling price of their new automobiles, and at the same time to realize that it is rather difficult to trade in a one year old shirt on the purchase of a new shirt in any department store in this country.

Mr. Spielman refers to the records of Dunn & Bradstreet. It would be most interesting if the court would examine the views held by Dunn & Bradstreet in connection with the Motor Vehicle Retailing industry. That organization would quickly supply specific data supporting my contention that the over-allowance and erroneous allowance factors have been the evil of the business of motor vehicle retailing.

The Banks of this country will quickly advise that the basic fault they found in the automobile dealership was the factor of over-allowance on the value of the used car.

Mr. Spielman offers no explanation of why the automobile industry fell to points below the indexes of other industries supplying the public with necessities. His reference to the desire of banks to bend backward in conservatism to remain liquid is most inconsistent with the tone of his complaint from which we might assume the business

of motor vehicle retailing needed no help in the way of fair trade practice. If the motor vehicle retailing business was as good through these years as he would have the court believe, surely the banks would have viewed it as a safe-
[fol. 347] ground and therefore would have loaned to an industry able to regularly liquidate its loans.

Mr. Spielman avoids any discussion of the fact that the automobile dealer is quite generally unable to enter and leave the business at his pleasure and not find himself confronted with vast liabilities which can quite easily bankrupt him. The automobile business has the peculiarity of requiring the special type of buildings, and when the dealer launches his enterprise he, with few exceptions, is forced to take a lease of a substantial character. Thousands of dealers have entered this business with an allowed territory under their factory franchises, and have had places built with special design to suit their needs. In addition to this fact, most dealers are forced to endorse the contracts concerning the sales of their new cars on time payment plans, and since failure to meet payments on the part of the purchaser brings numerous repossessions, the dealer must have an outlet for the disposal of these repossessed cars, or otherwise suffer considerable loss in most instances. These two factors make it most difficult for him to leave this business without continuing liabilities.

"On Page 84 of Mr. Spielman's analysis • • • "

Reference is here made to good will.

No reference is made in my affidavit to the sale of good will.

[fol. 348] Page 87 of Mr. Spielman's analysis of the Affidavit of Mr. Frost.

It should be noted that considerable stress is laid on this particular argument of Mr. Spielman's, and that my affidavit is attacked vigorously since there is a definite endeavor to use this point as a basis of many pages of his following contentions.

The National Automobile Chamber of Commerce in its 1934 edition of Automobile Facts and Figures is the basis for Mr. Spielman's argument. The average life of a motor vehicle is established at 92 months.

The argument continues with a reference to a rate of depreciation of 1-1/10% per month for 92 months which would obviously result in approximately 100% depreciation.

This is a most interesting highly erratic conclusion since in my affidavit the reference to a rate of 2½% per month to 3½% per month is apparently entirely misunderstood. The rate of depreciation referred to in my affidavit is the result of the handling of hundreds of thousands of averages and of the comparing of averages developed in one period as against a later period. In the comparing of these averages it should be noted that I refer distinctly to a rate of depreciation thus made apparent and which therefore could be applied to each month for purpose of analysis. A contention is made in Mr. Spielman's argument that would indicate that the life of a motor vehicle instead of being 7-2/3 years is claimed by myself to be 2½ to 3 years. This is entirely in error since Mr. Spielman has erred in his calculations as to how a rate of depreciation would be figured and also what would be the basis of the rate. Since the rate of depreciation in my affidavit is purely the result of a comparison of the various averages which developed on particular types over different periods, the application of the percentages of 2½ or 3½% must be made to the last value published. In order to entirely clarify the error of Mr. Spielman's conclusions and to show distinctly the obvious correctness of the publication, Automobile Facts [fol. 349] and Figures, from which source Mr. Spielman has drawn a grossly erratic conclusion the following table is set forth: The first figure shown in the table is $700.00. This figure we might assume is an average developed on a certain car at a particular period. The figure also could be considered as the price of a new motor vehicle, and from which price depreciation at a rate of 2½% per month would normally bring its value in six months, 12 months or 7 years to a specific value or point. Taking the first section of 6 months, it can be seen that the rate of 2½% per month brings its value from $700 down to $601.37. Taking the next six months, the value comes to a point of $516.75. An additional 12 months would bring its value to $381.51, and an additional 12 months and another additional 12 months would bring its value to $283.19. An additional 24 months would bring its value to $154.36, and another additional 12 months would bring its value to $113.97. It will be noted that the car is now 6 years old, presuming that the rate was figured from a new price of $700.00, it still has a remaining value of $113.97. Following this table to a point of Mr.

Spielman's conclusions which is 92 months, we find that the car still has a value of $68.77.

The following table therefore proves that the life of the vehicle is quite well estimated by the National Automobile Chamber of Commerce. It also proves the correctness of the conclusions in my affidavit.

Mr. Spielman would have to apply 1-1/10% to the original car price and thereby get an equal amount of monthly drop or depreciation in the 92nd month with the very first month. His entire conclusion is most erratic therefore and leaves his reasoning without base:

[fol. 350]

$700.00	$17.50	$682.50
682.50	17.06	665.44
665.44	16.63	648.81
648.81	16.22	632.59
632.59	15.81	616.78
616.78	15.41	60137
601.37	15.03	586.34
586.34	14.65	571.69
571.69	14.29	557.40
557.40	13.93	543.47
543.47	13.58	529.89
529.89	13.14	516.75
516.75	12.91	503.94
503.94	12.59	491.35
491.35	12.28	479.07
479.07	11.97	467.10
467.10	11.67	455.43
455.43	11.38	444.05
444.05	11.10	432.95
432.95	10.81	422.14
422.14	10.55	411.59
411.59	10.28	401.31
401.31	10.02	391.29
391.29	9.78	381.51
381.51	9.53	372.98
372.98	9.32	364.66
364.66	9.11	355.55
355.55	8.88	346.67

346.67	8.66	338.01
338.01	8.45	329.56
329.56	8.23	321.33
321.33	8.02	313.31
313.31	7.82	305.49
305.49	7.62	297.87
297.87	7.43	290.44
290.44	7.25	283.19
283.19	7.07	276.12
276.12	6.90	269.22
269.22	6.72	262.50
262.50	6.56	255.94
255.94	6.38	249.56
249.56	6.23	243.33
243.33	6.07	237.26
237.26	5.92	231.34
231.34	5.78	225.56
225.56	5.63	219.93
219.93	5.49	214.44
214.44	5.36	209.08
209.08	5.22	203.86
203.86	5.09	198.77
198.77	4.96	193.81
193.81	4.84	188.97
188.97	4.72	184.25
184.25	4.60	179.65

[fol. 351]

179.65	4.49	175.16
175.16	4.37	170.79
170.79	4.26	166.53
166.53	4.16	162.37
162.37	4.06	158.31
158.31	3.95	154.36
154.36	3.85	150.51
150.51	3.76	146.75
146.75	3.66	143.09
143.09	3.57	139.52
139.52	3.48	136.04
136.04	3.40	132.64
132.64	3.31	129.33
129.33	3.23	126.10

126.10	3.15	122.95
122.95	3.07	119.88
119.88	2.99	116.89
116.89	2.92	113.97
113.97	2.84	111.13
111.13	2.77	108.36
108.36	2.70	105.66
105.66	2.64	103.02
103.02	2.57	100.45
100.45	2.50	97.95
97.95	2.44	95.51
95.51	2.38	93.13
93.13	2.32	90.81
90.81	2.27	88.54
88.54	2.21	86.33
86.33	2.15	84.18
84.18	2.10	82.08
82.08	2.05	80.03
80.03	2.00	78.03
78.03	1.95	76.08
76.08	1.90	74.18
74.18	1.85	72.33
72.33	1.80	70.53
70.53	1.76	68.77

—92 months

The court will please note that the above table was developed in a most hurried condition, and possibly inaccuracies can be found therein.

[fol. 352] In my affidavit reference to the rate of depreciation is made directly in connection with the guide book at any particular point and shows the relationship of the monthly rate of decline as above proven in its relationship to the market in which the book is used.

Page 93 of Mr. Spielman's analysis sets forth an example of how a sale can be made and reported at a figure less than the amount of the sale. An arbitrary conclusion is reached by the pointing out of a car worth $500, but no mention was made as to by what standard Mr. Spielman establishes this car's worth. Secondly reference is made to a trade-in which has a true value of $150, but upon which the guide book establishes a maximum allowance of only $100.

Notice should be taken of these two points in connection with my affidavit concerning the analysis of all of Mr. Spielman's used car sales which were reported to the Association. This analysis correctly proves that Mr. Spielman, regardless of his other contentions, was unable to dispose of the used cars he accepted in trade at figures even as high as the guide book in a majority of the instances pointed out. Continuing in this same line of argument, Mr. Spielman avoids discussing the instances which offset his hypothetical example. No reference is made to the car which he has for sale worth $450, and upon which a prospect offers a trade-in with a book value of $150 but an actual value of only $100.

No notice is taken of the fact that sales are made in many instances (and on this point I refer the court to any reputable finance company) wherein the price of $450 is elevated to $500 in order that the dealer may allow $150 for a car worth $100. Such sales are reported to the Association at $500 and concern a car which had only a worth of $450.

It should be noted further that when a used car is traded-in on another used car purchase that the basic reason for such exchange is that the car traded in no longer gives satisfactory service since such trades in the main are in substandard condition when offered for trade on other used cars to be purchased.

[fol. 353] Consequently, since the buyer of another used car would ordinarily purchase a new car, were he financially able, it can be seen that the great bulk of such trades are cars which are offered by reason of their substandard condition and the need of the purchaser for better transportation.

Therefore, if it is true that the force of competition causes the dealer to frequently go the limit of the maximum allowance, quite obviously the example Mr. Spielman sets forth could be reversed as above explained, with better and more logical reason.

[fol. 354] Page 88 of Mr. Spielman's analysis:

Mr. Spielman states that the elimination of the marginal twenty percent reported sales as junk sales is truly a fair approximation of junk sales. In the handling of hundreds of thousands of used car sales reports, per month, and through the analysis of the statistics there developed, the National Automobile Dealers Association is prepared to prove be-

yond question of doubt that the example set forth in my affidavit showing the elimination of twenty percent to be a factor which distinctly raises the resultant average by its inclusion not only of junk sales but sales of automobiles far above the class referred to as junk. This is a statement founded on absolute fact and which we can support by an enormous volume of statistical proof. The reference made to the number of automobiles which fall in the junk classification has positively no bearing or reference to that contained in my affidavit, which pertains to the number of cars of each particular type, model and year, which when thrown into a set of samples from which the lowest twenty percent must be eliminated thereby raises the average as pointed out and proves an entirely different point than the one referred to in Mr. Spielman's reference. Of the approximate 25,000,000 cars operating in the United States, Mr. Spielman contends that a certain percentage is junk. We do not average all years and makes together. It should be noted that this number included all makes, types and models. My reference is distinctly to those cars of the same type and model and therefore Mr. Spielman's conclusions are in error since they are not pointed at the facts in my affidavit. Further reference is made to the publication of "Facts and Figures" compiled by the National Automobile Dealers Association. The publication "Facts and Figures" is not compiled and published by the National Automobile Dealers Association.

Reference is made to my affidavit contending that I claim the marginal twenty percent would not contemplate any junk sales. This is a misstatement of the facts contained in my affidavit. On Page 26 of my affidavit the following statement is made, "by reason of this provision sales which concern junk or wrecked cars are automatically eliminated from [fol. 355] any consideration in the average but so also are sales which are not of such a nature as to be termed "junk" or "wrecked" types."

"The deletion of the low twenty percent elminates from use in the average final tabulation, many sales which run within a few dollars of the medium average of all sales concerned."

The National Automobile Dealers Association will be pleased to supply veritable volumes of statistical tabulations concerning each or any guide book to date published definitely proving this point.

Page 89, Mr. Spielman analysis • • •

Reference is here made to seasonable variations of the used car market. Four examples are set forth which are definite exceptions but which most ably prove the accuracy of the statement in my affidavit concerning the fact that when the market rises the guide book responds to the change. While the calculations are based on sixty day periods, the publication of figures is made each thirty days. Quite obviously an overlap is thus effected which brings into the guide each thirty days those changes occurring in the market.

The illustrations referred to in Mr. Spielman's analysis are excellent proof of the manner in which the guide follows changes in the market.

Reference is made to particular seasons and even to particular months, stating without offering other than the opinion of Mr. Spielman that the market makes definite changes at particular periods. Since Mr. Spielman's used car sales are only a small fraction of the total of makes and models recorded in the guide book, it is obvious that without the guide as a basis for his statements he is completely without source of proof concerning his statements regarding market changes.

Temporary upturns in the used car market caused through increased demands and the character of supply are quickly and expediently given to the trade through the publication of the guide each thirty days. No reference in Mr. Spielman's analysis points out the fact that the ensuing thirty [fol. 356] or sixty days from such an upturn (which is both the exception and unusual) would bring to the ensuing period figures again higher than those referred to in my affidavit. The illustrations set forth treat carefully, it must be noted, with 1933 Chevrolet values, while at the same time no reference is made to the increase in new car prices put in effect by the Chevrolet Motor Company approximately during this same period. Such increases in new car prices have their influence particularly on cars of the immediately preceding model.

The illustrations pointed to by Mr. Spielman are therefore most excellent proof of the care with which this guide is developed and of the soundness of the formula and of the accuracy in which it follows the market on the best grade automobiles.

On page 91 and page 92, Mr. Spielman discusses the operation of a used car department setting forth figures concerning the number of his sales during the years 1931, 1932 and 1933, and stating that he is one of the largest automobile dealers in New York. These figures can be most enlightening when considered along with the the discussion. An admission that there are 5,000 different types of appraisals in copy agreement with my affidavit. An admission that it is necessary to properly recondition cars for resale and to spend money therefore is also made. An admission stating that a dealer must be able to buy his cars for not more than that which he can resell them should excite keen interest. These facts are basic and will be found also in my affidavit showing this point in its proper light.

The number of the complainants sales average slightly over one hundred per month. Elsewhere in this analysis, Mr. Spielman admits that a dealer handles many used cars of his own make. Obviously a number of these one hundred approximate sales per month are Chevrolet automobiles. Therefore Mr. Spielman furnishes in his own analysis affidavit specific proof that against a market ever changing and which concerns over 5,000 different types of appraisal, he, from his own experience, is able to determine values in a ratio of 100 to 5,000 of the appraisal types he may be [fol. 357] confronted with.

Page 94 of Mr. Spielman's analysis states "The complainant has strictly complied with every provision of this Code of Fair Competition, most of the dealers engaged in the metropolitan area of the City of New York have been forced through the economic necessity of sustaining themselves to violate provisions of the Code. • • •"

Mr. Spielman here charges virtually every red-blooded American citizen engaged in the Motor Vehicle Retailing Trade in the City of New York of practicing dishonestly and in violation of the Federal laws.

This statement is made to influence the court and is the greatest insult I have ever heard pertaining to this or any other American industry.

Mr. Spielman continues with the statement that the only trade-ins that he accepted were worth less than the average established by the guide book for the most part. It therefore should be interesting to note in the analysis of Mr. Spielman's own sales that there are numerous trades on which he did not allow as much as the Code permitted if

he follows what he claims as one of his principles of operating a used car department—allowing no more than he can resell the car for.

Mr. Spielman further states that he has accumulated a mass of cars practically all of which were accepted in trade at a price less than the average which represents the maximum trade-in allowance, proving this point. If after accepting these cars he does a proper job of reconditioning which then brings them up to a condition of better or best grade cars I am at a loss to understand why he was unable to sell these particular cars at figures as high or higher than the guide book. Nothing whatever prevents Mr. Spielman from selling these cars at any price he may be able, and it should be noted that the average automobile is a physical thing which can be repaired, repainted and thereby be put in a condition which often can bring it to the classification of best grade.

[fol. 358] Mr. Spielman's own reasoning therefore specifically again proves that the official guide is a report concerning best grade cars, and therefore establishes a value which quite apparently in his business has worked but little limitation on the amount of allowance he can make, while he pursues the practice of operating a used car department in which he claims he should not allow more than he can resell the used car for. Mr. Spielman makes no reference in this analysis affidavit to his first affidavit in which he stated that he was one of the largest dealers in New York, and from which statement we must draw the inference that he still is one of the largest dealers in New York. The amount of his volume of sales therefore has apparently not declined as we must infer he contends elsewhere in this analysis.

Mr. Spielman also contends in other points of his analysis of my affidavit that the comparisons that were made concerning these sales were not based on that figure which is the maximum allowance and which is computed through the deduction from the sales prices published of the mandatory 5, 10 and 15%. Reading of this section of my affidavit would correctly prove that all reference made to amounts of allowance which Mr. Spielman could have made are specifically calculated on the guide book with the mandatory deductions taken off.

The St. Louis office of the Code Authority is the focal point in relation to the guide book and used car values of

the dealers of this nation. With practically every dealer in the nation now using the guide book, quite naturally this office bears the brunt of all complaints and criticism that can be made against the guide. We receive complaints against the guide from every section of the United States, but I am able to state and prove that each and all of these complaints over the past eight months have been, with the exception of not to exceed a handful, addressed to us in vigorous language stating that the guide book allowances are far too high. This further proves, when it is considered, that not a handful of complaints have been received [fol. 359] throughout this nation that the guide is too low during the last eight months that Mr. Spielman's own verbal statement made to me after the first hearing in this court was from the heart and I feel true in his opinion. In the presence of Mr. Southworth, Chairman of the New York State Advisory Committee, Mr. Spielman, in a friendly discussion with myself, verified and stated openly that the guide was too high when I remarked that it was singular that the majority of his sales were at less than the guide book figures. Mr. Spielman further stated that his real complaint against this Code was directed at the point of non-compliance, which he claimed to be the action of other dealers who were thus taking business away from him.

The National Automobile Dealers Association is a non-profit institution, and is owned and controlled by the dealers of this nation. Mr. Spielman makes broad statements in his analysis of my affidavit, which statements are not the result of studies of this problem entailing volumes of substantial statistics, but pure guess work, unsupported and easily proven in error. He states that the low 20% deletion has not increased the resultant published average in the face of our willingness to prove beyond question the accuracy of the statistical facts set forth in my affidavit. Mr. Spielman in one statement would have the court believe that there has never been a firm price established on new Chevrolet automobiles. He knows full well that the suggested delivered prices established by the automobile manufacturer are the basis of all of his selling prices for new motor vehicles. Mr. Spielman would have the court believe, that without cooperative action he could appraise each used car accurately, and yet he offers no suggestion of what standard of value he would employ in the face of

his admission that his own experience in the selling of used cars approximates only one small fraction of the number of cars he must measure the value on when appraising.

[fol. 360] Mr. Spielman is complaining that competition from other dealers, who he claims are violating the code, is taking business away from him, while at the same time elsewhere in his affidavit, on page 97, he endeavors to prove that dealers would not go the maximum foolishly.

On page 97 of Mr. Spielman's analysis of my affidavit, he states "dealers will not pay prices that run in excess of the true value of the vehicle, and consequently under such circumstances there is very little opportunity of over paying the purchaser of the new car."

This is surely inconsistent with his contention that he is losing business to other dealers who allow more than he will allow for the used car.

On page 97 and 98 of Mr. Spielman's analysis he refers to the return for questioning of certain sales reports. This is explained in full detail in my original affidavit, but in the light of his argument, it is interesting to note the following facts:

Mr. Spielman, irrespective of the abrupt nature of the letter with which the reports were returned was in no manner directed not to return these reports again to the Association if they were in order. Had he later returned these reports they would have been used in the tabulations then current, and as a consequence would have been sales coming from an even earlier period than that provided in the Code and used in the building of averages in a later official guide book. Copies were kept of each and every report returned, and also copies were kept of the letters of reply from dealers who expressed gratitude to the Association for having called their attention to the laxity in their offices when they made out these first reports. These letters can be quickly supplied.

On page 98 of Mr. Spielman's analysis, he states it is also difficult to understand how the National Automobile Dealers Association employed the used car sales reports of Mr. Spielman when after it had been returned to him it was never again forwarded to the National Automobile [fol. 361] Dealers Association. Quite obviously Mr. Spielman here admits one of two things—either the reports thus returned to him were incorrectly made out and he supplied

other reports on these sales in their stead, or Mr. Spielman had little or no interest in his own Association and its own official guide book, and did not take the trouble to return the reports if they were correct, and send a letter, as did many other dealers thanking the Association for its watchfulness and stating that the reports were correct and therefore should be used.

When reports are received today which show the year of the car to be in disagreement with the model of the car stipulated in the report, quite obviously, a report made out in this fashion is useless and not correct. The Association makes no effort to guess at which of the statements is correct. It is therefore necessary to return such reports to dealers for corrections. And I wish to add that it will continue to be the practice of this Association as long as dealers make inaccurate reports which obviously are not true on the face. Example: 1929 V8 Ford. No such car exists. I am also able to state that out of hundreds of thousands of reports received, only a very few today are received which have these inaccuracies above referred to.

This I think indicates the keen interest which is taken on the part of dealers in the building of their own official guide book, and is an interest which quite apparently is not taken by Mr. Spielman if it was true that he did not return the reports to us after they were questioned.

My affidavit and the exhibits attached to it in connection with this subject are complete, and Mr. Spielman's challenge on this point is merely one of accusing honest employees of dishonest practices. I did not state and we do not know whether or not he specifically again returned these reports.

Page 99 of Mr. Spielman's analysis. Mr. Spielman states that no prices are fixed by the automobile manufacturers. [fol. 362] He however does not explain what the factory list price of an automobile is that is generally seen advertised throughout the nation, and who does establish that price.

Mr. Spielman continues with the statement that the method of price regulation would very seriously tend to regiment all dealers in one single straight-jacket of one arbitrary price where the personality and service of each of the dealers would be seriously discounted. He would have the court believe that if the Spielman Motor Company

had not conducted its business along the lines laid down by the manufacturer with which it has its contract, and had sold Shevrolets at any price he chose, that this manufacturer would have been pleased with the operations and would have continued him in business, while he thus injured all dealers of his make near him. Quite obviously Mr. Spielman has sold Chevrolet cars at the price suggested by his factory over the period of years in which he has been a dealer. Mr. Spielman would convey the impression that what he calls price regulation would make all makes of cars sell at one single price, and entirely avoids discussing the competitive relations between various makers of cars which establishes free competition between makes and which is fully explained in my original affidavit. [fol. 363] I find nothing in Mr. Spielman's analysis of my affidavit which proves any of his points or contentions through the use of facts. His claims are most general, and his figures, where such are used, seem definitely to argue against his claim rather than for it. I appreciate that my affidavit is of an academic nature, and that the use of figures and statistics is quite general.

I have endeavored to be most conservative in my claims and at the same time wish to assure the court that whatever additional proof or data is required concerning any figures set forth, or statements made, can quickly be supplied.

Dated: September 6, 1934.

(Signed) Jack Frost.

Subscribed and sworn to before me this 6th day of September, 1934. (Signed) Burt Roberts, Notary Public in and for said County and State.

My commission expires March 28, 1937. (Notarial Seal.)

[fol. 364] *Duly sworn to by Jack Frost. Jurat omitted in printing.*

[fol. 365] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

And now comes William C. Dodge, District Attorney of New York County, State of New York, defendant in the

above cause, and moves to dismiss the Bill of Complaint filed in this cause, and for reasons thereof states as follows:

1. Said Bill of Complaint fails to allege facts constituting an equitable cause of action or entitling the plaintiff to any relief whatever.

2. Said bill of Complaint shows on its face that the Court does not have jurisdiction to grant the relief prayed for or any relief whatever.

3. Said Bill of Complaint fails to allege facts showing the proper amount is involved to give the Court jurisdiction.

4. Said Bill of Complaint shows on its face that the plaintiff has an adequate and complete remedy at law.

[fol. 366] 5. Said Bill of Complaint fails to allege facts showing the plaintiff would suffer irreparable loss or damage.

6. The alleged cause of action contained in said Bill of Complaint amounts to a suit against the State of New York, of which this Court has no jurisdiction.

7. Said Bill of Complaint shows on its face that it seeks an injunction to stay proceedings in the Courts of the State of New York, which relief is prohibited by Section 265 of the Judicial Code (28 U. S. C. A. 379).

Wherefore defendant prays the judgment of this Court whether he shall further answer, and that he be dismissed with his costs.

David Blitzer, Harold H. Straus, Attorneys and Solicitors for Defendant.

[fol. 367] In United States District Court; Southern District of New York

Spielman Motor Sales Co., Inc., Complainant,

against

William C. Dodge, as District Attorney of New York County of the State of New York, Defendant

Before: Martin T. Manton, Circuit Judge, Robert P. Patterson and Murray Hulbert, District Judges compos-

ing a statutory court convened pursuant to § 380 of the United States Code.

Suit for injunction. An application for an injunction pendente lite is made. Motion denied.

John J. Bennett, Jr., Esq., Attorney General of the State of New York; Henry Epstein, Esq., Solicitor General, of Counsel. Miller, Paul & Placer, Esqs., Attorneys for Complainant; S. Frederick Placer, Esq., Isadore Paul, Esq., of Counsel. David Blitzer, Esq., Assistant District Attorney, Harold H. Straus, Esq., Special Assistant to the District Attorney, Solicitors for Defendant; Stanley Osserman, Esq., of Counsel. National Re-
[fol. 368] covery Administration, Amicus Curiae. Eugene Frederick Roth, Esq., Assistant Counsel, Litigation Division, National Recovery Administration, of Counsel.

OPINION—Filed Oct. 8, 1934

MANTON, Circuit Judge.

This suit, heard before a court convened pursuant to §380 United States Code, seeks to enjoin the enforcement of ch. 781 of the Laws of 1933 of New York because, it is said, the statute violates the Federal Constitution (14th Amendment) and the New York State Constitution (Art. 3, Sec. 17). The act is said to violate the latter because it constitutes an invalid delegation of legislative authority. The challenged act, passed in and of the National Industrial Recovery Act, has for its purpose the regulation by codes, duly adopted, of all industries which are subject to code regulation.

Pursuant to the National Industrial Recovery Act, approved June 16, 1933, a code of fair competition for the motor vehicle retailing trade was formulated and accepted by the President of the United States on October 3, 1933. By Art. 4, subdiv. (a) of the Code, a method of ascertaining the maximum allowance that may be made in the sale of a new car was fixed. This maximum is arrived at by averaging the actual sales prices of used cars of each make and model of car over a specified period in a particular trade area as reported by the members of the trade in sworn statements to the National Automobile Dealers Association. In arriving at this average, the lowest 20% of

all sales are eliminated, and from this average a deduction of from five to fifteen per cent must be made to compute the maximum allowance for trade-ins. The amount to be [fol. 369] so deducted depends upon the maturity of the model. The code also prohibits selling below, or giving a discount on, the factory list price of a new car plus certain expenses.

The plaintiff is an automobile dealer merchandising Chevrolet cars within the State in very substantial numbers annually. Plaintiff's principal objection to the automobile code adopted is directed to the trade-in transactions when a new motor car is purchased. It is claimed that any trade-in allowances against sale prices, rebates and other devices are used to defeat fixed price schedules for the second hand car.

The purpose of the Code is to regulate the amount to be allowed on used cars which are accepted by dealers in a trade-in transaction. Unregulated allowances were an evil which led to unfair competition. Under the State Act (Schackno Law) provision is made for enforcement, by the State of New York, of the codes adopted by the National Industrial Recovery Act, upon the filing of such codes with the Secretary of the State of New York. Thus the codes become the standard of competition in intrastate business. The automobile code was so filed with the Secretary of State. Under the code, prices of used cars are attempted to be fixed for trade-ins only. Otherwise the field as to used car prices and factory list prices of new cars is open and remains changeable at the will of the purchaser. The fixing or attempted fixing of prices for trade-ins is an attempt to cure an evil leading to unfair competition and, as such, is price regulation. That there may be a difference between the reasonable value of a used car in the open market and the maximum allowance permitted, under the code, on a trade-in would not necessarily mean a [fol. 370] discrimination unless it be that the allowance so fixed is arbitrary, unreasonable or capricious.

Price regulation by the code, filed pursuant to the act, does not violate the Constitution. Nebbia v. People, 291 U. S. 502. There is no deprivation of equal protection of the law. The code does not place plaintiff at a disadvantage or affect him adversely and this alone is fatal to the claim of denial of equal protection. Nor is plaintiff denied

due process by the statute's enforcement. There is an admitted power in the legislature to regulate existing economic evils by an appropriate regulation of business. Home Bldg. & Loan Asso. v. Blaisdell, 290 U. S. 398. The indirect result may be a restriction of freedom of contract.

Fixation of prices for trade-ins is based upon the fact, sufficient to satisfy the Legislature, that the retail automobile industry has been adversely affected by economic conditions sufficiently to create an emergency. In Nebbia v. People, supra, the court said on page 535, after referring to Munn v. Illinois (94 U. S. 113), that

"Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices."

And further:

"It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as [fol. 371] arbitrary or discriminatory. Wolff Packing Co. v. Industrial Court, 262 U. S. 520, 535. * * * These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. * * *

If the law making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public."

The code method of ascertaining the maximum used-car allowance is reasonable. To be sure, all practical price regulation may have as a consequence some individual inequalities. But a price based on an average of business or of trades in the past is harmonious and seems to be founded in fairness. An average arrived at from the amounts some of which are in excess of and some below the means does not work for invalidity as long as the basic principle or method is fair. The principle of regulation of [fol. 372] price is fundamentally fair even though there is some reasonable disregard in individual cases. Such disregard is inherent in any broad social policy.

There are no facts found in the complaint and moving papers supporting the plaintiff's claim of an unfair difference between the maximum used-car allowance permitted by the code and the reasonable value of a car submitted for trade-in purposes. To support the plaintiff's case, it must be shown that the method of fixing the trade-in allowance is arbitrary or discriminatory, leading, by caprice or otherwise, to unreasonable discrepancies. No more reasonable method of regulation for the correction of an evil of unfair trade is pointed out. Without a convincing showing by specific instances of unreasonable differences between the maximum permitted under the code and the real market values, no general charge of unconstitutionality can be sustained. Jeffrey Mfg. Co. v. Blogg, 235 U. S. 571; Plymouth Coal Co. v. Pa., 232 U. S. 531.

Complaint is also made of the code provisions (Art. 4, sec. b, para. 2) giving regulations as to discounts and allowances by dealers. Maintenance of prices by manufacturers through contractual arrangements with dealers or agents have long existed. It is not price fixing; the ultimate price still remains in the will of the manufacturer's discretion. Such maintenance of prices by agents and dealers flows from the contractual relationships with other manufacturers and is permissible as well as legal. Appalachian Coals Inc. v. United States, 288 U. S. 344. Nothing alleged in the complaint points to an instance where the plaintiff sought to give a discount or rebate [fol. 373] under the regular price of a new car. The law may legalize by statute or administrative act what may be done by legal agreement.

This statute contained a sufficient declaration of the existence of an emergency. Ch. 781, Sec. 1, of the Laws of

1933 after pointing out the existence of a national emergency, recites that it is

"declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the Congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said National Industrial Recovery Act which are applicable in interstate commerce in the State of New York."

The right of a state legislature to recognize, in this period of economic stress, an emergency has been authoritatively decided. Home Bldg. & Loan Asso. v. Blaisdell, supra; Nebbia v. People, supra.

The Congress of the United States has frequently reposed wide powers and responsibility in the executive branch of our government and this legislation has withstood attack. Field v. Clark, 143 U. S. 649; United States v. Williams, 194 U. S. 279; United States v. Grimaud, 220 U. S. 506; J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394; Ryan v. Amazon Petroleum Corp., 71 Fed. 2, 1.

The National Industrial Recovery Act was far reaching in its effect upon industry. Its purpose, to contend with an emergency, is found in Title 1, Sec. 1 of the Act. To [fol. 374] supplement, strengthen and eliminate any conflicts in carrying out the policies of the government by reason of existing state laws, many states, including New York, have passed industrial recovery laws similar to the national act. The state law of New York was passed with an intent to cooperate with the national act for the general welfare.

The constitution, as submitted to the States for ratification, did not contain any one article guaranteeing the citizens any rights of "due process of law." It contained very few guarantees of personal rights in any form. Mott, Due Process of Law (1926) (15). The powers of the federal government are limited and their limit should not be transcended, as stated in McCulloch v. Md., 17 U. S. 315 (1819).

"But • • • the sound construction of the Constitution must allow to the national legislature that discretion,

with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and the spirit of the constitution, are constitutional."

The National Industrial Recovery Act as an emergency measure is limited to two years duration. Aside from the purpose of the act as stated, the method by which the act seeks to lessen destructive competition and curb the predatory business practices is first through voluntary coopera-
[fol. 375] tion and adjustment amongst the interested parties themselves. In this way the act is primarily a permissive rather than a mandatory statute. It accordingly enjoins rather than restricts industry's freedom of action in permitting certain types of collective action designed to promote the purposes of the act. If a certain industry chooses to take advantage of certain of the comprehensive features of the act regarded as beneficial to them, the act then requires that they do certain things designed to benefit the particular trade or industry and the country in general.

The constitutional issues conceded to be involved in testing the validity of the act concerned, are its mandatory as distinguished from its permissive features. Section 3 (d) of the Act is pertinent in this cause. By Section 3 the President is authorized to prescribe a code of fair competition for the trade or industry where abuses inimical to the public interest are prevalent, giving such code the effect and force of a voluntary code. The recovery act was enacted under the powers of Congress to regulate interstate and foreign commerce. The power to do so under the commerce clause of the Constitution must be recognized because of the long line of cases upholding a wide variety of regulatory legislation. The Lottery Cases, 188 U. S. 321; United States v. Ferger, 250 U. S. 199.

But the question is raised here as to whether Congress has attempted to use the power to regulate interstate commerce as the means of controlling intrastate production. By indirection local matters are capable of federal control. [fol. 376] Houston & Texas Ry. v. United States, 234 U. S.

342; Stafford v. Wallace, 258 U. S. 495. Hammer v. Dagenart (247 U. S. 251), to which reference is made in the plaintiff's brief, denied Congress the power over commerce which is subject to the regulatory powers of the individual states and held that the manufacture of goods is not commerce. This was a five to four decision of the Supreme Court and stands alone in a long line of decisions decided before and since. A series of acts and decisions (United States v. Hill, 248 U. S. 420; Brook v. United States, 267 U. S. 432), beginning with the Interstate Commerce Act of 1887 until the Transportation Act of 1927, have left little to the argument that products manufactured within the state even when intended to be sent across the state lines, are not subject to federal regulation. The Sherman Anti-trust Act of 1890 initiated regulation by Congress of contracts, combinations and monopolies in restraint of interstate commerce. The Federal Pure Food & Drug Act of 1906 barred from interstate commerce foods or drugs not inspected or labeled in accordance with the act. Other illustrations are found in the Meat Inspection Act (U. S. C. A. Title 21, § 71), the Safety Appliance Act (U. S. C. A. Title 45, §§ 1-7), the Employers Liability Act (U. S. C. A. Title 45, § 51), the Mann Act (U. S. C. A. Title 18, §§ 397-404) and the Hours of Service Act (U. S. C. A. Title 45, §§ 61-64). The Hawes-Cooper Act effective January 1, 1934, subjects prison-made goods sent from one state to another to the laws of the latter state.

The constitutionality of the application of a prescribed code, as distinguished from a voluntary code, must be determined in accordance with the relations of the particular industry to interstate or intrastate traffic and to the general [fol. 377] welfare of the nation regardless of the fact that the immediate operation of the subject of the code is confined to a particular locality. A state may exercise certain police powers, which seem to be unlimited (Home Bldg. Loan Asso. v. Blaisdell, 290 U. S. 398) but Congress may not do so as there are no federal police powers under the Constitution.

Authoritative decisions of the Supreme Court have considered the doctrine of business affected with the public interest. Marcus Brown Co. v. Feldman, 256 U. S. 170; Nebbia v. People, supra. But a business which is of little public consequence today may become affected with public

interest in later years and a business vital today may well become obsolete tomorrow. Thus the regulation may be valid for business of one sort in given circumstances and invalid for another sort or for the same sort of business in different circumstances. The test has always been one of reasonableness, and applying that test to the instant case, the claim of breach of the Constitution must fail.

The New York State Constitution, Article III, Section 17, provides:

"No act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of said act, or which shall enact that any existing law or part thereof shall be applicable except by inserting it in such act."

The Schackno Law in no manner makes the National Industrial Recovery Act a part of its provisions. It declares the policy of the state and its desire to make uniform the standards of fair competition prevailing in intrastate industry with those standards of interstate commerce re- [fol. 378] quired by the provisions of the National Industrial Recovery Act. As stated by Sec. 2 of the Shackno Law, the filing of the code with the Secretary of State regulated intrastate transactions and nowhere is there an adoption by statement or indication, of the National Industrial Recovery Act as a part of the act, nor is it made "applicable."

The code is but an administrative product of the executive's application of the National Industrial Recovery Act. It is not a law. By virtue of the Schackno Law it may, when filed, become enforceable under the state statute. The enforcement of the code provisions by the state within its own jurisdiction is no delegation or abdication of the legislative or other state functions as charged. The code as an administrative act of the national government is merely made fully enforceable in intrastate sales. Under the decisions of the New York State courts, the attack against the Schackno Law as a surrender of the state power under Art. III, Sec. 17 of the Constitution has failed.

The state legislature may provide that it would follow the provisions of the National Code, without further investigation as to details of standards such as those set up

in the code, in an effort to enforce the policy of Congress within the state in intrastate affairs.

The motion for an injunction is denied.

Martin T. Manton, Circuit Judge. Robert P. Patterson, District Judge. Murray Hulbert, District Judge.

Dated: October 5th, 1934.

[fol. 379] [File endorsement omitted.]

[fol. 380] IN UNITED STATES DISTRICT COURT

SPIELMAN MOTOR SALES CO. INC., Complainant,

against

WILLIAM C. DODGE, as District Attorney of New York County of the State of New York, Defendant

ORDER DISMISSING BILL OF COMPLAINT—Oct. 18, 1934

This cause having duly come on to be heard before a Special Statutory Court convened pursuant to Section 380 of the Judiciary Code comprised of Judges Martin T. Manton, Circuit Judge, Robert P. Patterson and Murray Hulbert, District Judges, on complainant's motion for a preliminary injunction and on defendant's motion to dismiss the Bill of Complaint;

Now, after reading and filing the Bill of Complaint, the motion to dismiss same, the affidavits submitted in complainant's behalf and the affidavits submitted in defendant's behalf and after hearing Miller, Paul & Placer, Esys., Isa-[fol. 381] dore Paul, Esq., of counsel, for complainant and David Blitzer, Esq., Assistant District Attorney by Harold H. Straus, Esq., Special Assistant to the District Attorney, John J. Bennett, Jr., Henry Epstein, Esq., Solicitor General of counsel, National Recovery Administration amicus curiæ, Eugene Frederick Roth, Esq., Assistant Counsel Litigation Division, of Counsel, for the defendant; it is

Ordered, that a preliminary injunction against the said defendant be and the same hereby is denied; and it is further

Ordered, that the Bill of Complaint be and the same is dismissed with costs to the defendant.

Dated: New York, October 15th, 1934.

Martin T. Manton, Robert P. Patterson, Murray Hulbert, United States Judge.

[fol. 382] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed Nov. 13, 1934

On this day came the Complainant, by Miller, Paul & Placer, its Solicitors, and presented its Petition for appeal and its Assignment of Errors, which have been duly filed, and upon consideration thereof, it is

Ordered and adjudged: That an appeal to the Supreme Court of the United States from the Order heretofore entered in the above entitled cause on the 18th day of October, 1934, denying said complainant's application for a preliminary injunction herein and granting the defendant's application for an Order and Decree dismissing the Bill of Complaint herein, be and the same hereby is allowed to said Complainant; that the bond on said appeal be fixed at the sum of $250, the same to be and act as a bond for costs but not as a supersedeas; that a certified copy of the record on which said Order was based and the opinion by this Court upon said application herein, be transmitted in due course to the Supreme Court of the United States.

Dated, New York, N. Y., November 9th, 1934.

Robert P. Patterson, U. S. D. J.

Service admitted.

[File endorsement omitted.]

[fol. 383] In United States District Court

[Title omitted]

Assignment of Errors—Filed Nov. 13, 1934

Now comes the Complainant-Appellant in the above entitled cause and in connection with its Petition for appeal,

files the following Assignment of Errors upon which it will rely on its appeal to the Supreme Court of the United States from the Order of the United States District Court, Southern District of New York, entered October 18th, 1934, in the above entitled cause, denying the complainant-appellant's application for a preliminary injunction and granting the defendant-appellee's application dismissing the Bill of Complaint herein on the merits:

1. The Court erred in not finding that the Code of Fair Competition for the Motor Vehicle Retail Trade, is null, void and invalid, having been adopted and approved by the President of the United States in violation of the National Industrial Recovery Act (48 Stat. 195) and being part of Title 15 of the United States Code, and part of Title 15 of U. S. C. A. (Commerce & Trade) and being Sections 701 to 712 inclusive.

2. The Court erred in not finding that Article IV of the Code of Fair Competition for the Motor Vehicle Retail Trade, is null, void and invalid and unconstitutional, being repugnant to the 14th amendment of the Constitution of the United States.

[fol. 384] 3. The Court erred in not finding that Chapter 781 of the Laws of 1933 of the State of New York, is null, void, invalid and unconstitutional.

4. The Court erred in holding that the National Industrial Recovery Act (48 Stat. 195) was constitutional.

5. The Court erred in holding and deciding that the Code of Fair Competition for the Motor Vehicle Retail Trade was constitutionally enacted.

6. The Court erred in holding that Chapter 781 of the Laws of 1933 of the State of New York, was validly enacted by the Legislature of the State of New York.

7. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York, did not provide for excessive punishment.

8. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York, was not an improper delegation of legislative function of the Legislature of the State of New York, in violation of the Constitution of the State of New York.

9. The Court erred in holding and finding that Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, did not deprive the complainant of its rights, liberty and property, without due process of law.

10. The Court erred in holding and finding that Congress was vested with authority to regulate the matters expressed in the said National Industrial Recovery Act (48 Stat. 195).

11. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade, so far as the provisions thereof permit of the regulation of the prices on trade-ins, was valid and constitutional.

[fol. 385] 12. The Court erred in holding and finding that the National Industrial Recovery Act did not provide for excessive punishment.

13. The Court erred in holding and finding that Congress did not improperly and illegally delegate its legislative functions and powers to the President of the United States.

14. The Court erred in holding and finding that the National Industrial Recovery Act and the Code of Fair Competition for the Motor Vehicle Retailing Trade, adopted and approved pursuant thereto, do not and did not deprive the complainant of its rights, liberty and property, in derogation and violation of the Fifth Amendment to the Constitution of the United States.

15. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York, grants any direct or implied power to determine maximum prices on trade-ins.

16. The Court erred in failing to hold and find that the Code of Fair Competition for the Motor Vehicle Retailing Trade, so far as the provisions thereof permit price regulation and the fixation of maximum prices on trade-ins, is invalid and void as beyond the scope of the National Industrial Recovery Act, and unconstitutional under the Fifth and Fourteenth Amendments of the Constitution of the United States.

17. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York, was not void, invalid and unconstitutional for indefiniteness.

18. The Court erred in holding and finding that the price of trade-ins on motor vehicles can be regulated by the [fol. 386] State of New York under Chapter 781 of the Laws of 1933 thereof.

19. The Court erred in holding and finding that Congress was vested with power and authority to regulate the maximum prices to be paid by automobile dealers on trade-in automobiles.

20. The Court erred in holding and finding that the Complainant herein was not entitled to pay on traded-in automobiles an amount which the complainant determined to be the fair and reasonable value of said traded-in automobile.

21. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade and Chapter 781 of the Laws of 1933 of the State of New York, was valid under Article III, Section 17 of the New York State Constitution.

22. The Court erred in holding and finding that the method of ascertaining the maximum allowance on trade-in automobiles under Article IV, Subdivision A of the Motor Vehicle Retail *Code*, was fair, reasonable and just, and in not finding that the same was unfair, unreasonable, arbitrary and capricious.

23. The Court erred in holding and finding that the complainant was not permitted to sell below or give a discount on the factory list price of new automobiles.

24. The Court erred in failing to hold and find that paragraph 2 of Subdivision B of Article IV of the Code of Fair Competition of the Motor Vehicle Retailing Trade, was unconstitutional and deprived the complainant of its rights, liberty and property, without due process of law.

25. The Court erred in finding that paragraph 2 of Subdivision B of Article IV, was fair, reasonable and just, and in not finding that the same was unfair, unreasonable [fol. 387] and capricious.

26. The Court erred in holding and finding that price regulation as permitted by the Code of Fair Competition

for the Motor Vehicle Retailing Trade, adopted pursuant to the National Industrial Recovery Act, and filed pursuant to Chapter 781 of the Laws of 1933 of the State of New York, does not violate the Constitution.

27. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade does not deny the complainant the equal protection of the law.

28. The Court erred in holding and finding that Congress was vested with power to regulate and control the local intrastate business of a motor vehicle dealer.

29. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade, was not a statute but a mere administrative product of the President's application of the National Industrial Recovery Act.

30. The Court erred in holding and finding that by the provisions of Chapter 781 of the Laws of 1933 of the State of New York, the Legislature of the State of New York did not abdicate and delegate its legislative functions to the Congress of the United States, to the President of the United States, and to persons other than the Legislature of the State of New York.

31. The Court erred in failing and refusing to grant the complainant's application for a temporary injunction.

32. The Court erred in holding and finding that the Bill of Complaint did not allege a cause of action.

[fol. 388] Wherefore, complainant prays that the decision of the District Court and the Order entered thereon be reversed, and that the said District Court of the United States for the Southern District of New York, be directed to enter an Order vacating and setting aside its said Order dated October 18th, 1934, and be directed to enter an Order granting an interlocutory injunction as prayed for in the Bill of Complaint, restraining, enjoining and prohibiting the defendant from commencing any threatened criminal prosecution against the complainant for any alleged violation of

the provisions of the Code of Fair Competition for the Motor Vehicle Retail Trade.

Dated, New York, N. Y., November 9th, 1934.

Miller, Paul & Placer, Attorneys for Complainant Appellant, Office & P. O. Address, 276 Fifth Avenue, Borough of Manhattan, City of New York.

Service admitted.

[File endorsement omitted.]

[fol. 389] RECITAL AS TO BOND

Cost bond on Appeal in the sum of $250.00 was served duly approved by Robert P. Patterson, U. S. D. J. on November 13th, 1934 and filed in U. S. District Court, Southern District of New York.

[fols. 390-392] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed Nov. 13, 1934

You are hereby notified, that the United States District Court for the Southern District of New York, has filed and entered an Order allowing an appeal to the Supreme Court of the United States, from the Order signed, filed and entered on the 18th day of October, 1934, in the above entitled cause, and that the Order allowing the appeal makes the same returnable on the 8th day of December, 1934.

Dated, New York, N. Y., November 12th, 1934.

Miller, Paul & Placer, Attorneys for Complainant, Office & P. O. Address, 276 Fifth Avenue, Borough of Manhattan, City of New York.

To John J. Bennett, Jr., Esq., Attorney General of the State of New York, New York, N. Y. David Blitzer, Esq., Asst. District Attorney, Harold H. Straus, Esq., Asst. District Attorney, Solicitors for the Defendant.

Receipt of the foregoing Notice is hereby acknowledged this 13th day of November, 1934.

—— ——, Attorney General of State of New York.

Service Admitted.

Harold H. Straus, Asst. Dist. Atty., Solicitors for defendant.

[File endorsement omitted.]

[fol. 393] Citation in usual form showing service—Filed Nov. 13, 1934, omitted in printing.

[fol. 394] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 395] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT THE ENTIRE RECORD—Filed Dec. 8, 1934

The Appellant will, in brief and in oral argument on the hearing of the appeal for a reversal of the Order of the District Court denying Complainant's application for a preliminary and temporary injunction, and granting the defendant's application to dismiss the Bill of Complaint, rely on the Assignment of Errors as and for its points herein.

And the Appellant further states that the whole of the Record as filed, is necessary for the consideration of the case.

Dated, New York, N. Y., November 10th, 1934.

Miller, Paul & Placer, Attorneys for Complainant, Office & P. O. Address, 276 Fifth Avenue, Borough of Manhattan, City of New York.

Service of the foregoing Statement of Points to be relied upon and designation of the parts of the Record to be printed, and receipt of a copy thereof are hereby accepted and acknowledged, this — day of November, 1934.

—— ——, Attorney General of the State of New York, Esq. Harold H. Straus, Asst. District Atty., Attorney and Solicitor for Defendant.

[fol. 396] [File endorsement omitted]

[Endorsed on cover:] File No. 39,195. S. New York, D. C. U. S. Term No. 567. Spielman Motor Sales Co., Inc., Appellant, vs. William C. Dodge, as District Attorney of New York County, State of New York. Filed December 8, 1934. File No. 567 O. T. 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 567

SPIELMAN MOTOR SALES CO., INC., APPELLANT,

vs.

WILLIAM C. DODGE, AS DISTRICT ATTORNEY OF NEW YORK COUNTY, STATE OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 25, 1935.

—6011-C

[fol. a]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SPIELMAN MOTOR SALES CO. INC., Complainant-Appellant,

against

WILLIAM C. DODGE, as District Attorney of New York County of the State of New York, Defendant-Appellee

STIPULATION AS TO SUPPLEMENTAL RECORD

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following enumerated papers constitute the supplemental papers to be printed in the Record on Appeal in the transcript of the record:

1. Stipulation dated January 30th, 1935, and Order of Court based thereon.

2. Complainant's proposed Findings of Fact and Conclusions of Law.

3. The Court's Findings of Fact and Conclusions of Law.

4. Supplemental Assignment of Errors.

Dated, New York, February 20th, 1935.

Miller, Paul & Placer, Attorneys for Complainant-Appellant. David Blitzer, Harold H. Straus, Attorneys for Defendant-Appellee.

So ordered:

Robert P. Patterson, U. S. D. J.

[fol. 1] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ON STIPULATION AS TO FINDINGS AND CONCLUSIONS, ETC. —Feb. 1, 1935

Upon the pleadings, papers and proceedings heretofore had herein and upon reading and filing the annexed stipu-

lation signed by the attorneys for the respective parties hereto, it is

Ordered, that the relief consented to and stipulated in the annexed stipulation be and the same is hereby granted.

Martin T. Manton, United States Circuit Judge;
Murray Hulbert, United States District Judge;
Robert P. Patterson, United States District Judge.

Enter: —— ——.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW, ETC.—Filed Feb. 1, 1935

Whereas, the above named complainant has commenced the above entitled action against the above named defendant for a permanent injunction for the relief set forth in the Bill of Complaint herein; and

Whereas, the complainant has heretofore moved this Court before a Statutory Court composed pursuant to Title 28, Section 380 of the Judicial Code for a preliminary injunction and the defendant by notice of motion duly moved to dismiss the Bill of Complaint and both motions having been duly heard simultaneously by the said Statutory Court; and

Whereas, upon the said hearing affidavits and exhibits were submitted by the complainant in support of its application and by the defendant in opposition thereto and all the facts and issues having been developed in the affidavits and exhibits submitted on the hearing before the said Statutory Court on the said complainant's application for a temporary injunction and the defendant's application to dismiss the Bill of Complaint; and

[fol. 3] Whereas, after due deliberation the said Statutory Court rendered its opinion and entered a final decree denying the application of the complainant for an interlocutory injunction and dismissing the Bill of Complaint herein from which Decree complainant has duly appealed to the Supreme Court of the United States; and

Whereas, the transcript of the record on appeal herein has been duly certified and transmitted to the Clerk of the United States Supreme Court and an order has been made by the United States Supreme Court noting probable jurisdiction of this cause; and

Whereas, in the opinion of all counsel herein, to wit, counsel for the complainant, for the defendant and counsel for the Attorney General and Governor of the State of New York, and the parties to this action, findings of fact and conclusions of law in accordance with Equity Rule 70½ are deemed necessary in order that the record on appeal herein be completed and in order that there may be a final adjudication of the issues in this appeal on the merits;

Now, therefore, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto as follows:

(1) That the hearing on the application for a preliminary injunction and upon the motion to dismiss the Bill of Complaint be deemed a final hearing on the merits, that answer to the Bill of Complaint be deemed to have been waived, and that the affidavits and exhibits introduced upon [fol. 4] such hearing by the respective parties be deemed the evidence and testimony upon such final hearing with the same effect as though same had been adduced by oral testimony of the respective affiants.

(2) That the respective parties hereto submit proposed findings of fact and conclusions of law based upon said affidavits and exhibits submitted on the hearing with the same force and effect as though the said proposed findings of fact and conclusions of law were submitted at the conclusion of the final hearing of this case and that such of the said proposed findings of fact and conclusions of law as shall be found by the court be deemed to have been found and filed nunc pro tunc as of the 15th day of October, 1934.

(3) That the complainant be deemed to have excepted to all findings of fact and conclusions of law found for the defendant and to any and all refusals to find as requested by it nunc pro tunc as of the date of the said Decree and that the defendant be deemed to have excepted to the findings of fact and conclusions of law found in behalf of the complainant and to any and all refusals to find as re-

quested by him nunc pro tunc as of the date of the said Decree and that the said exceptions be deemed to have been duly made.

(4) That the complainant be and hereby is allowed and permitted to file supplemental assignments of errors, assigning any additional errors as may be deemed necessary within five days after the findings of fact and conclusions of law have been duly made and found; the said supple-
[fol. 5] mental assignment of errors to be deemed to have been filed nunc pro tunc as of the date of the original assignment of errors filed herein.

(5) That the foregoing findings of fact and conclusions of law, with exceptions thereto, and supplemental assignment of errors together with this stipulation and any further orders of the Court on this stipulation shall be added to the transcript of the record and shall be made part of the record on this appeal.

(6) That the parties consent to the entry of such order or orders as will give effect to the provisions and purposes of this stipulation.

Dated New York, January 30th, 1935.

Miller, Paul & Placer, Attorneys for Complainant. David Blitzer, Harold H. Straus, Attorneys for Defendant. John J. Bennett, Jr., Attorney General of the State of New York.

[File endorsement omitted.]

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Feb. 16, 1935

The above entitled cause having come on regularly for hearing before Honorable H. T. Manton, H. P. Patterson, and Murray Hulbert, Judges of the above entitled Court, upon the application of the complainant for an order enjoining the defendant's enforcement of Chapter 781 of the

Laws of 1933 for the State of New York, and the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly the provisions of Article IV thereof, the complainant appearing by Miller, Paul & Placer, and the defendant, William C. Dodge, as [fol. 7] District Attorney for New York County of the State of New York, appearing by David Blitzer and Harold H. Straus, and the State of New York appearing by John J. Bennett, Jr., Attorney General of the State of New York, and Henry Epstein, Solicitor General, and thereupon evidence was introduced by the complainant in support of the allegations in its complaint, and by the defendant in opposition thereto, and in support of the defendant's application to dismiss the bill of complaint, and the National Recovery Administration appearing amicus curiæ, by Eugene Frederick Roth, Assistant Counsel, Litigation Division, National Recovery Administration, and the Court having duly heard and considered the evidence and the arguments of counsel, and being fully advised in the premises, makes the following

Findings of Fact

First. The complainant consents to defendant's Findings of Fact numbered "1st", "2nd", "3rd", "4th", "5th", "6th", "7th", "7-A", "8th", "9th", "10th", "11th", "12th", "13th", "14th", "15th", "17th", "18th", "19th", "20th", "21st", "22nd", "23rd", "24th", "29th", "30th", "31st", "32nd", "33rd", "34th", "45th", "47th", "48th", "49th", "50th", "51st", "52nd", "53rd", "54th", "55th", "57th", "58th", "60th", "68th", "69th", "70th", "71st", "72nd", "73rd", "74th", "77th", "78th", "79th", "80th", "81st", "82nd", "83rd", "86th", "87th" and "88th".

Second. That pursuant to the provisions of Chapter 781 of the Laws of the State of New York of 1933, it is a violation of the said Motor Vehicle Retailing Code and Chap- [fol. 8] ter 781 of the Laws of the State of New York of 1933, for any retail motor vehicle dealer to offer or give to a prospective customer as a trade-in allowance on the sale of a new motor vehicle, a price in excess of that established in the Official Guide Book and that such violation constitutes a misdemeanor punishable by a fine not exceeding $500.00, and imprisonment of not more than one day for

each dollar of fine imposed under the provisions of the Code of Criminal Procedure of the State of New York, and for each day such violation continues a separate offense deemed subject to the penalties hereinabove recited.

Third. That prior to the approval of the Code of Fair Competition for the Motor Vehicle Retailing Trade, and the filing of a certified copy of the aforesaid Code in the office of the Secretary of State of New York, and in the office of the Department of State thereof, pursuant to Chapter 781 of the Laws of 1933 for the State of New York, the complainant did offer to the public, its customers and patrons, actual, fair and honest market values for used automobiles that were offered to it by customers as trade-ins, on the purchase of new automobiles.

Fourth. That but for the adoption and approval of the Code of Fair Competition for the Motor Vehicle Retailing Trade, and but for the provisions therein contained establishing the maximum trade-in allowances in the official guide book, and but for the fact that Chapter 781 of the Laws of 1933 of the State of New York fixes a penalty not [fol. 9] exceeding $500.00 fine for each violation of the aforesaid provision of the Code of Fair Competition for the Motor Vehicle Retailing Trade, the complainant would continue to offer trade-in allowances in the sale of new cars which were fair and actual market prices thereof, and that the complainant would not in any wise be restricted from paying its customers fair, honest and actual market values on trade-ins.

Fifth. The automobile industry with its kindred industries, such as iron, steel, gasoline, rubber, plate-glass, nickel, lead, mohair and upholstery leather, directly or indirectly, is responsible for employing one out of every eleven workers employed in the United States.

Sixth. That prior to the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade, the value of used cars offered for trade-ins by the public on the purchase of new automobiles, was determined by the dealers upon market values, physical condition, year, model, and make of automobile.

Seventh. No single motor vehicle retail dealer had a complete knowledge of the values of all the automobiles that

comprised the approximate five thousand different makes, models and series of cars in the hands of the public.

Eighth. Market reports of used cars sold, supplied the motor vehicle dealers with some basis for ascertaining the value of used cars in the hands of the public that may be [fol. 10] offered as trade-ins on the purchase of new automobiles, and that said market reports were based upon market conditions, supply and demand, and the actual fair value of trade-ins as determined by their physical condition, make, series and model. NOT FOUND

Ninth. Prior to the adoption of the aforesaid Code of Fair Competition, dealers ascertained from all available means the sales prices of used cars on the market and these prices were published in the form of Guide Books and sold to members of the Motor Vehicle Retailing Trade as an additional aid to them in the determination of trade-in values. The figures thus compiled were reflections of the market, but dealers were in no way bound competitively or otherwise, by them, and offered to the public on trade-ins what they considered to be the fair and actual value of the trade-in with the foregoing as an aid to them in such determination. NOT FOUND

Tenth. Pursuant to the provisions of Article IV of the Code of Fair Competition, the National Automobile Dealers Association, a trade association incorporated under the laws of the State of Illinois, with its principal office in St. Louis, Missouri, compiled an official guide known as the "Association Official Guide Book", which said Official Guide Book creates and establishes "average prices" for used motor vehicles, which said "average prices" represent the maximum allowance permitted to be paid to prospective purchasers on their used motor vehicles on a trade-in. FOUND

[fol. 11] Eleventh. Theoretically, this establishment of a maximum price for any particular model of automobile traded in for practical purposes, has become the maximum price for all automobiles traded in of the said particular model. NOT FOUND

Twelfth. Inasmuch as 85% of all transactions contemplate a trade-in, the fixing of such maximum prices for such trade-in, serves to fix the basis of the transaction and consequently, the price of a new car purchase. NOT FOUND

NOT FOUND

Thirteenth. While the Code of Fair Competition called for the establishment of "average prices" based upon actual used car sales, the National Automobile Dealers Association, the official reporting agency designated by the said Code, fixed arbitrary prices irrespective of actual reported sales.

NOT FOUND

Fourteenth. Without foundation in reason or cause, and without investigation the National Automobile Dealers Association returned used car sales reports duly authenticated, to dealers throughout the Nation and to the complainant advising them that such reports would not be considered in establishing an average.

NOT FOUND

Fifteenth. The officers of the National Automobile Dealers Association arbitrarily and unreasonably established fixed values on trade-ins and then utilized such reports submitted to them necessary to sustain their conclusion. All others were necessarily rejected.

[fol. 12] Sixteenth. That by allowing customers and patrons of the complainant, actual, fair and honest values on used cars or trade-ins on the purchase of new automobiles, such prices being higher or lower than the average fixed in the Official Guide, in accordance with the actual value of the car, complainant made and makes a fair return and profit on its investment.

FOUND

Seventeenth. That complainant, in the establishment and conduct of its business, has invested and expended in both physical assets and in the establishment and retention of intangible good will, vast and considerable sums of money which has resulted in the development of a patronage of great monetary value.

NOT FOUND

Eighteenth. By actual tabulation, the complainant, in its attempt to comply with the price provisions fixed in the Official Guide, has lost one hundred eighty sales of automobiles which were later consummated by other dealers at prices prohibited by the Code, the loss to the complainant in dollar volume being well in excess of $100,000. in sales.

NOT FOUND

Nineteenth. The enforcement of the provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, has occasioned great loss to the complainant, and if such provisions are to be further enforced, will

occasion further and additional loss and will effectually force the complainant out of business.

[fol. 13] Twentieth. That pursuant to the provisions of Article IV of the Code of Fair Competition, a customer desiring to trade in, is prohibited from receiving the actual, full and fair value of his traded in automobile by virtue of the maximum figures of the Official Guide, irrespective of the condition of the car, the style, make or model. NOT FOUND

Twenty-first. A traded in, used automobile, actually worth more than the average, cannot be traded in at a higher price than the maximum established in the Official Guide. NOT FOUND

Twenty-second. Owners of used cars are free to sell, as distinguished from trading in their automobiles, without restriction of any kind, to dealers exclusively engaged in purchasing and selling used cars at any price offered consonant with the condition of the used car, year, model, style and make, whereas motor vehicle dealers may not pay more than the maximum figure placed upon the said particular car in the Official Guide Book. FOUND

Twenty-third. The sales of used cars by the public to used car dealers instead of trading the same to dealers selling new cars, effectually reduces the purchases of new car dealers, and thereby deprives the said new car dealers of consummating sales on the trade-in plan, and from reselling at a profit the used cars traded in. NOT FOUND

[fol. 14] Twenty-fourth. The State of New York appointed no state agency to administer the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade. NOT FOUND

Twenty-fifth. The State of New York appointed no state agency nor any Commission or body of its citizens to promulgate the Code of Fair Competition for the Motor Vehicle Retailing Trade. NOT FOUND

Twenty-sixth. The Legislature of the State of New York did not specifically enact the Code of Fair Competition for the Motor Vehicle Retailing Trade as and for its own Act. NOT FOUND

Twenty-seventh. No hearings before any legislative committee, nor any debates in the Legislature of the State of New York, were held on the question of adopting the Code NOT FOUND

of Fair Competition for the Motor Vehicle Retailing Trade for the State of New York.

NOT FOUND

Twenty-eighth. The Code of Fair Competition was not in existence when Chapter 781 of the Laws of 1933 of the State of New York, was enacted.

Twenty-ninth. Allowance of fair, actual and honest market values on used car trade-ins, is not an unfair, competitive practice.

NOT FOUND

Thirtieth. The State of New York, prior to the adoption of Chapter 781 of the Laws of 1933, at no time passed any legislation nor any other regulation regulating the Motor Vehicle Retailing Trade and prohibiting any of the practices which are now prohibited by Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

FOUND

[fol. 15] Thirty-first. That the defendant as District Attorney of the County of New York, State of New York, will, unless restrained from so doing, institute criminal proceedings in a Court of competent jurisdiction, to enforce the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade and the Official Guide, against the complainant herein, for its purported violation of the said Code and Official Guide, and in the event that complainant refuses to comply with the said pretended law, and in the event of conviction for such purported violation, complainant will be subject to the heavy penalties prescribed to be inflicted upon it by virtue of said Chapter 781 of the Laws of 1933, which said penalties, if complainant be compelled to pay, will be a deprivation of its rights, liberties, properties and immunities, without due process of law, as herein alleged.

NOT FOUND

Thirty-second. That in the event that complainant is compelled to abide by the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly by the prices fixed in the Official Guide Book, having apparent sanction of law pursuant to Chapter 781 of the Laws of 1933, and is compelled to charge the arbitrary, unreasonable, harsh, oppressive and inequitable prices purportedly fixed, promulgated, established and issued, complainant cannot continue in its aforesaid lawful business, in which event it will be deprived of its rights,

liberty, property, privileges and immunities, without due process of law.

[fol. 16] Thirty-third. That unless a permanent injunction be granted herein, the complainant will suffer irreparable damage of incalculable determination. NOT FOUND

Thirty-fourth. That Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade abridges and denies the freedom of contract between motor vehicle retail dealers and customers desiring to trade in used cars on the trade-in plan, in that the motor vehicle retail dealer may not contract to allow more than the maximum price for the said trade-in as promulgated in the Official Guide Book. NOT FOUND

Thirty-fifth. That the complainant has no adequate remedy at law and can only have relief in a Court of Equity. FOUND

Conclusions of Law

That judgment be entered herein decreeing as follows:

1. That the Code of Fair Competition for the Motor Vehicle Retailing Trade, is null, void and invalid, having been adopted and approved by the President of the United States in violation of the National Industrial Recovery Act, more particularly Chapter 1 and Chapter 3a thereof.

2. That more particularly Article IV and said Official Guide Book as provided in said Article IV, is invalid, null, void and unconstitutional, being repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the same deprives complainant of its rights, liberty and property without due process of law.

[fol. 17] 3. That Chapter 781 of the Laws of 1933 of the State of New York, is invalid, null, void, and unconstitutional, by reason of the illegal manner of enactment, as providing for excessive punishment, as an improper delegation of legislative function in violation of the Constitution of the State of New York, and repugnant to the Fourteenth Amendment of the Constitution of the United States in that it deprives the complainant of its rights and property without due process of law.

4. That Chapter 781 of the Laws of 1933 of the State of New York, the Code of Fair Competition for Motor Vehicle

Retailing Trade, and the Official Guide Book issued pursuant thereto, are invalid, null, void, and unconstitutional in that they deprive the complainant of its rights, liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

5. That the National Industrial Recovery Act, the Code of Fair Competition for the Motor Vehicle Retailing Trade and the Official Guide Book are invalid, null, void and unconstitutional in that the National Industrial Recovery Act was enacted by Congress in excess of the power granted to it by the Constitution of the United States, as providing for excessive punishment, as an improper delegation of legislative power by the Congress to the President, and as depriving the complainant of its rights, liberty and property, in derogation and violation of the Fifth Amendment to the Constitution of the United States.

6. That the defendant, William C. Dodge, as District Attorney for the County of New York, State of New York, his successors, assistants, deputies, agents and employees be temporarily and permanently enjoined from in any way or manner enforcing against the complainant any of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly the provisions of Article IV thereof, and any order, rule or regulation that may be issued thereunder or that has been issued thereunder or any of the price regulations fixed and promulgated in the Official Guide Book as provided by Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade or any part or parts thereof, and from instituting or causing to be instituted any suit at law or in equity, prose-
[fols. 18 & 19] cution or proceeding or otherwise as the case may be against the complainant herein for any alleged violation of any of the provisions of the said Code of Fair Competition for the Motor Vehicle Retailing Trade under Chapter 781 of the Laws of 1933 of the State of New York.

Ordered, that judgment be entered accordingly.

Martin T. Manton, Circuit Judge; Robert P. Patterson, District Judge; Murray Hulbert, District Judge.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Feb. 16, 1935

The above entitled cause having come on regularly for hearing before Honorable M. T. Manton, R. P. Patterson and Murray Hulbert, Judges of the above entitled Court, upon the application of the complainant for an order enjoining the defendant's enforcement of Chapter 781 of the Laws of 1933 for the State of New York and the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly the provisions of Article IV thereof, the complainant appearing by Miller, Paul & Placer, and the defendant, William C. Dodge, as District Attorney for New York County of the State of New York, appearing by David Blitzer and Harold H. Straus, and the State of New York appearing by John J. Bennett, Jr., At-[fol. 21] torney General of the State of New York, and Henry Epstein, Solicitor General, and thereupon evidence was introduced by the complainant in support of the allegations in its complaint, and by the defendant in opposition thereto and in support of the defendant's application to dismiss the bill of complaint, and the National Recovery Administration appearing amicus curiæ, by Eugene Frederick Roth, Assistant Counsel, Litigation Division, National Recovery Administration, and the Court having duly heard and considered the evidence and the arguments of counsel, and being fully advised in the premises, makes the following

Findings of Fact

First. The complainant, Spielman Motor Sales Co. Inc., is a New York corporation engaged in the business of motor vehicle retailing as defined in the Code of Fair Competition for the Motor Vehicle Retailing Trade, doing [illegible]siness in the State of New York and with its places of business located in the City of New York.

Agreed.

Second. The complainant is one of the largest motor vehicle retail dealers in the City of New York, operating

four branches besides its principal place of business, and employing approximately 80 employees.

Agreed.

Third. The defendant, William C. Dodge, is the duly elected District Attorney for the County of New York, State of New York.

Agreed.

Fourth. Under and by virtue of the several laws of the State of New York, it is the duty of the defendant, William C. Dodge, as such District Attorney for the County of New York, to prosecute in an official capacity all violations of law and public offenses.

Agreed.

[fol. 22] Fifth. On or about the 16th day of June, 1933, there was enacted by the Congress and President of the United States a law entitled "National Industrial Recovery Act."

Agreed.

Sixth. On or about the 26th day of August, 1933, there was enacted by the State of New York a law entitled "Laws of 1933, Chapter 781."

Agreed

Seventh. At the time of the enactment of both the National Industrial Recovery Act and Chapter 781 of the Laws of 1933 of the State of New York, there existed both a national and state emergency based upon the widespread bankruptcy of business, mounting unemployment and the general prostration of industry.

Agreed.

Seventh A. That thereafter and pursuant to the provisions of the National Industrial Recovery Act, a Code of Fair Competition for the Motor Vehicle Retailing Trade was approved October 3, 1933, by the President.

Agreed.

Eighth. On or about the 5th day of December, 1933, pursuant to the provisions of Chapter 781 of the Laws of 1933

for the State of New York, a certified copy of the Code of Fair Competition for the Motor Vehicle Retailing Trade was filed in the office of the Secretary of State and in the office of the Department of State thereof; that by reason thereof the said Code became the standard of fair competition for the Motor Vehicle Retailing Trade of the State of New York. That said Code of Fair Competition is hereto annexed marked "Exhibit A."

Agreed.

Ninth. That pursuant to the provisions of Chapter 781 of the Laws of the State of New York of 1933, it is a violation of the said Motor Vehicle Retailing Code and Chapter 781 of the Laws of the State of New York of 1933, for any retail motor vehicle dealer to offer or give to a prospective customer as a trade-in allowance on the sale of a new motor [fol. 23] vehicle, a price in excess of that established in the official Guide Book, and that such violation constitutes a misdemeanor punishable by a fine not exceeding $500.00, and imprisonment of not more than one day for each dollar of fine imposed under the provisions of the Code of Criminal Procedure of the State of New York, and for each day such violation continues a separate offense is deemed subject to the penalties hereinabove recited.

Agreed.

Tenth. That on or about the 7th day of July, 1934, the defendant openly and publicly proclaimed to the complainant that he was prepared and ready, through his office as the District Attorney for the County of New York, State of New York, to institute a criminal prosecution against the complainant herein for alleged violations of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly for violations of Article IV, Subdivision A, Paragraph 1, and Article IV, Subdivision B, paragraph 2.

Agreed.

Eleventh. That pursuant to the authority of Chapter 781 of the Laws of 1933 of the State of New York, on or about the 7th day of July, 1934, an application was made by the defendant, William C. Dodge, and his several assistants, to a Magistrate of the City of New York, County of New York,

in the name of the People of the State of New York, for the issuance by said Magistrate of a summons directing and requiring the Spielman Motor Sales Co. Inc. to appear before the said City Magistrate, or any City Magistrate holding court, at the City Magistrate's Court at 301 Mott Street, in the Borough of Manhattan, City, County and State of New York, on the 9th day of July, 1934, at ten o'clock A. M., to the end that investigation be made of an alleged complaint against the Spielman Motor Sales Co. Inc. for purported [fol. 24] violations of the provisions of the Motor Vehicle Retailing Code; that upon such investigation, an information be drawn against the complainant herein for alleged violation, charging it with the violation of the aforesaid provisions of the Motor Vehicle Retailing Code.

Agreed.

Twelfth. That prior to the enactment of the Code of Fair Competition for the Motor Vehicle Retailing Trade, and the filing of a certified copy of the aforesaid Code in the office of the Secretary of the State of New York, in the office of the Department of State thereof, pursuant to Chapter 781 of the Laws of 1933 for the State of New York, Spielman Motor Sales Co. Inc. was restricted only by its own sense of discretion in offering trade-in allowances on used cars to prospective customers in the sale of new automobiles, without legal restriction.

Agreed.

Thirteenth. That but for the adoption and approval of the Code of Fair Competition for the Motor Vehicle Retailing Trade, and but for the provisions therein contained establishing the maximum trade-in allowances in the official guide book, and but for the fact that Chapter 781 of the Laws of 1933 of the State of New York fix a penalty not exceeding $500.00 fine for each violation of the aforesaid provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, the complainant could continue to offer trade-in allowances in the sale of new cars without restriction, except by its own sense of discretion.

Agreed.

Fourteenth. The Motor Vehicle Retailing Trade is one upon which many other industries are primarily dependent for their existence.

Agreed.

[fol. 25] Fifteenth. The Motor Vehicle Retailing Trade is an integral part of the Motor Vehicle Manufacturing Industry which is directly dependent upon the Motor Vehicle Retailing Trade for the sale of its commodities.

Agreed.

Sixteenth. The automobile industry with its kindred industries, such as iron, steel, gasoline, rubber, plate-glass, nickel, lead, mohair and upholstery leather, directly or indirectly, is responsible for employing one out of every eleven workers employed in the United States.

Disputed. Agreed.

Seventeenth. Every State in the United States supplies materials used in the automobile industry.

Agreed.

Eighteenth. The automobile industry employs directly or indirectly over four million persons.

Agreed.

Ninteenth. The automobile industry ranks first as a consumer of iron and steel, gasoline, rubber, plate-glass, nickel, lead, mohair and upholstery leather and consumes approxmately 14.5% of all the lumber used in the United States.

Agreed.

Twentieth. In 1929 there were approximately 44,000 motor vehicle retail dealers in the United States.

Agreed.

Twenty-first. In 1929 the net sales of new and used car dealers were in excess of $6,200,000,000.00.

Agreed.

Twenty-second. In 1929 the Motor Vehicle Retailing Trade employed approximately 330,617 full time employees and 11,413 part time employees.

Agreed.

Twenty-third. During the past ten years the business of the Motor Vehicle Retailing Trade has experienced a sharp

transition. From 22 used cars accepted in trade-in for every 100 new cars sold there are now and have been for [fol. 26] the past few years approximately 85 used cars accepted in trade-in for every 100 new cars sold.

Agreed.

Twenty-fourth. 85% of all sales made by the Motor Vehicle Retailing Trade are based on trade-in allowances on used cars.

Agreed.

Twenty-fifth. In the economic paralysis of the industries of the United States that occurred after 1929 the Motor Vehicle Retailing Trade suffered severely. Dealers sought every competitive advantage in order to remain in business.

Disputed. FOUND

Twenty-sixth. The most serious and injurious unfair competitive practice employed was the practice of accepting used cars upon a trade-in allowance far in excess of their actual resale value.

Disputed. FOUND

Twenty-seventh. The economic depression that resulted after 1929 intensified and inflamed this destructive competitive practice of granting excessive trade-in allowance in the sale of new automobiles to the point where it threatened extinction and bankruptcy to the industry.

Disputed. FOUND

Twenty-eighth. That serious consequences of this uncontrolled destructive competition were fully manifested prior to the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

Disputed. FOUND

Twenty-ninth. The number of motor vehicle retail dealers engaged in the motor vehicle retailing trade was reduced from a total of 44,000 in 1929 to a total of 32,000 dealers engaged in the motor vehicle retailing trade in 1932.

Agreed.

[fol. 27] Thirtieth. The volume of business and value of

sales of the motor vehicle retailing trade diminished approximately 75% between 1929 and 1932.

Agreed.

Thirty-first. In 1929 over 5,600,000 motor vehicles were sold by manufacturers at a valuation in excess of $3,500,000,000.00.

Agreed.

Thirty-second. In 1932 approximately 1,400,000 new motor vehicles were sold by manufacturers at a valuation of approximately $793,000,000.00.

Agreed.

Thirty-third. The capital investment of the Motor Vehicle Retailing Trade was substantially reduced between 1929 and 1932.

Agreed.

Thirty-fourth. In 1932 the average hour wage rate for employees of the Motor Vehicle Retailing Trade had diminished approximately 47% in comparison to the wages paid in 1929. The Motor Vehicle Retailing Trade employed 87,891 fewer persons than those employed in 1929.

Agreed.

Thirty-fifth. The competitive abuse of granting excessive trade-in allowance was one of the major factors that caused the bankruptcy of a large portion of the members of the trade and threatened the balance of the trade with imminent bankruptcy.

Disputed. FOUND

Thirty-sixth. The general effect of the competitive practice of granting excessive allowances on trade-ins in the sale of new automobiles was to disorganize and disrupt the industry and cause a sharp and drastic reduction of the wage and labor standards through-t the industry.

Disputed. FOUND

[fol. 28] Thirty-seventh. The destruction of the Motor Vehicle Retailing Trade was reflected by the condition of the motor vehicle manufacturing industry which in 1929

employed 427,459 employees who received a total of $775,178,810.00 in wages, and in 1932 employed 229,800 employees whose wages totaled the sum of $282,929,302.00.

Disputed. FOUND

Thirty-eighth. Communities throughout the United States were seriously affected by the disintegration of the Motor Vehicle Retailing Trade, both through individuals unemployed, vacant stores and real estate, and in the general reduction of business activity.

Disputed. FOUND

Thirty-ninth. The vast number of motor vehicle retail dealers and their wide-spread location throughout the United States made impossible any effectual effort at self regulation in eliminating the destructive competitive practice of granting excessive allowances on trade-ins for new automobiles.

Disputed. FOUND

Fortieth. Efforts made by State and Local governments alone failed to prevent reductions in wage rates and proved ineffectual in curbing further increases in unemployment.

Disputed. FOUND

Forty-first. The Motor Vehicle Retailing Trade spread throughout the country, located in large cities and small villages, could not be regulated effectively by State legislation alone but required the cooperation of both the State and Federal government.

Disputed. FOUND

Forty-second. The improved labor standards both in the reduction of working hours and the increase in compensation provided for by the Motor Vehicle Retailing Trade Code could not effectively be maintained unless the com- [fol. 29] petitive evil of granting excessive trade-in allowances could be reasonably regulated.

Disputed. FOUND

Forty-third. The inability of the Motor Vehicle Retailing Trade to support fair labor standards because of the huge losses it sustained through excessive and unwarranted

trade-in allowances caused the President of the United States to approve and include Article IV in the Code of Fair Competition for the Motor Vehicle Retailing Trade.

Disputed. FOUND

Forty-fourth. The intendment of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade is not only to correct and curb the grave trade abuse which had developed in serious and menacing proportions as a form of secret rebate and exorbitant discount granted to purchasers as trade-in allowances, but primarily to insure the ability of the Motor Vehicle Dealers to pay to labor the increased compensation provided for in the aforesaid Code of Fair Competition.

Disputed. FOUND

Forty-fifth. There are more than five thousand makes, models and series of used cars in the hands of the public.

Agreed.

Forty-sixth. Prior to the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade, there was no reliable means of establishing the reasonable value of the more than five thousand different makes, models and series of used cars in the hands of the public.

Disputed. FOUND

Forty-seventh. No single Motor Vehicle Retail Dealer has a complete knowledge of the values of the automobiles that comprise the five thousand different makes, models and series of cars in the hands of the public.

Agreed.

[fol. 30] Forty-eighth. Prior to the adoption of the aforesaid Code of Fair Competition reports of used cars sold supplied the Motor Vehicle Retail dealers with some basis for ascertaining the value of the large number of used cars in the hands of the public that may be offered in trade in the purchases of new automobiles.

Agreed.

Forty-ninth. Prior to the adoption of the aforesaid Code of Fair Competition certain business firms ascertained from

the avalable means at their disposal the sales prices of used cars sold. These prices were then averaged and published in the form of guide books, which were sold to members of the Motor Vehicle Retailing Trade.

Agreed.

Fiftieth. The better known guide books were employed by Insurance Companies for their own purposes as a basis for ascertaining the value of automobiles in the hands of the public.

Agreed.

Fifty-first. Prior to the adoption of the aforesaid Code of Fair Competition the better known guide books were accepted as some evidence of market values of used automobiles in many if not all of the Courts of the country.

Agreed.

Fifty-second. Prior to the adoption of the aforesaid Code of Fair Competition credit organizations, banks, insurance companies and Courts of law accepted the published values of reputable concerns who collected statistics covering the sale of used cars as some evidence of correct appraisal values of the type and model of cars reported.

Agreed.

Fifty-third. The method employed in the original Guide Books is greatly emplified and definitely regulated by the Code of Fair Competition for the Motor Vehicle Retailing [fol. 31] Trade by requiring all motor vehicle dealers to submit sworn reports of the sales of their used automobiles.

Agreed.

Fifty-fourth. Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade requires that in the compilation of the average trade-in figures that the lowest 20% of all sales reported shall be eliminated.

Agreed.

Fifty-fifth. The deletion of the low 20% of used car sales reported as provided for by the aforesaid Code of Fair Competition eliminates from use in the average final tabulation published in the Official Guide Book many sales which

run within a few dollars of the median average of all sales reported.

Agreed.

Fifty-sixth. The elimination of the low 20% from use in the average final tabulation directly causes the tabulated figure which is published in the official Guide Book to be placed higher up in the bracket of sales recorded of the highest value.

Disputed. FOUND

Fifty-seventh. The sales reported occur during the prior sixty day period and become applicable for the subsequent thirty day period but no allowance for depreciation is provided. Used cars depreciate at the rate of 2% to 3½% per month.

Agreed.

Fifty-eighth. The method provided by the aforesaid Code of Fair Competition provides for a compilation of sales for the sixty day period preceding. The element of depreciation is not included and is a factor that insures a high maximum figure when published in the Official Guide Book.

Agreed.

[fol. 32] Fifty-ninth. When the used car market rises the Official Guide Book responds to the change as the calculations are based on 60 day periods and the publication of figures is made each thirty days creating an overlap which brings into the official Guide Book each 30 days changes occurring in the market.

Disputed. FOUND

Sixtieth. The Code of Fair Competition for the Motor Vehicle Retailing Trade provides for the operation of Article IV subject to the supervision of the National Recovery Administration.

Agreed to.

Sixty-first. The power of establishing maximum trade-in allowances through Article IV of the aforesaid Code of Fair Competition is placed directly in the hands of the

consuming public as its basis is the sales price made by the purchases of the consuming public.

Disputed. FOUND

Sixty-second. The National Automobile Dealers Association the agency designate- in the aforesaid Code of Fair Competition did not fix arbitrary prices without regard to reported sales. The National Automobile Dealers Association performed its duty of collecting and securing the sworn reports of sales of used cars conscientiously and complied completely both with the spirit and language of Article IV of the aforesaid Code in arriving at the Guide Book Allowance which was published.

Disputed. FOUND

Sixty-third. Sales of used cars made by the complainant during the period of the Code and reported to the National Automobile Dealers Association clearly indicates that the prices published in the official Guide Book were too high instead of not high enough.

Disputed. FOUND

Sixty-fourth. Complainant has failed to show by specific instance that unreasonable differences exist between the maximum trade-in allowance permitted under the aforesaid [fol. 33] Code of Fair Competition and the real market value.

Disputed. FOUND

Sixty-fifth. The trade-in allowance represents an equivalent in dollars and cents of part of the sales price of the new automobile. The comprehensive reporting system provided in Article IV of the aforesaid Code fixes a fair value in terms of money on used cars offered in trade as part consideration in the purchases of new automobiles.

Disputed. FOUND

Sixty-sixth. The mechanism provided in Article IV of the aforesaid Code in effect translates into dollars and cents value for the Motor Vehicle Retail Dealer the commodity, the used car, that prior thereto possessed an uncertain and fluctuating value.

Disputed. FOUND

Sixty-seventh. No evidence has been offered by the complainant in support of its charge that it lost sales by reason of the fact that the official Guide Book Trade-in allowance was not fair.

Disputed. FOUND

Sixty-eighth. That prior to the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade, the Retail Motor Vehicle Dealers were compelled to respect the sales prices established by the manufacturers of new motor vehicles and maintenances of price by automobile manufacturers through contractual arrangements with dealers or agents has long existed in the trade.

Agreed to.

Sixty-ninth. The manufacturer- of automobiles are not subject to the terms of the Code of Fair Competition for the Motor Vehicle Retailing Trade and each manufacturer has complete control of the price of his product and may increase or lower his price to meet the competitive forces of his fellow manufacturers. The factory made prices of new cars of different makes are highly competitive.

Agreed to.

[fol. 34] Seventieth. The complainant has not set forth or complained of an instance where it endeavored to sell a new Chevrolet automobile openly in competition with other Chevrolet dealers at less than factory established prices.

Agreed to.

Seventy-first. Motor Vehicle Retail Dealers are not restricted by the aforesaid Code of Fair Competition in making the best deal possible under the maximum figure provided in the official Guide Book.

Agreed.

Seventy-second. Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade imposes no requirement that compels the owner of an old car to sell it at any particular price. It does not compel the dealer if he becomes the owner of a used car to resell it at any particular price. It applies in a transaction between a dealer

and a prospective purchaser when that purchaser offers an old care as part of the consideration for a new automobile.

Agreed.

Seventy-third. The Motor Vehicle Retail dealers are free to resell to the public used cars without restriction as to the price they may secure.

Agreed.

Seventy-fourth. Owners of used cars are free to sell (as distinguished from trade-in) their automobiles without restriction of any kind through either the substantial number of dealers exclusively engaged in the used car business or directly to other persons who desire to purchase used automobiles.

Agreed.

Seventy-fifth. Complainant has not produced any evidence of a single instance where a used car owner has received more through the channels of the free market of the used car dealers than the Official Guide Book figures provided.

Disputed. FOUND

Seventy-sixth. There has been a substantial improvement both in business and in employment in the Motor Ve- [fol. 35] hicle Retailing Trade since the adoption of the aforesaid Code of Fair Competition.

Disputed. FOUND

Seventy-seventh. The employment figures for members of the National Automobile Chamber of Commerce for May, 1933, showed 99,343 employees; for May, 1934, 206,965 employees.

Agreed.

Seventy-eighth. In the first six months of 1932 a total of 663,625 registrations for new cars were made. For the first six months of 1934 there have been 995,121 registrations of new cars made.

Agreed.

Seventy-ninth. The monthly retail sales of motor vehicles in the United States for the calendar year 1933 and for the months from January to June, 1934, are as follows:

1933:	Total motor vehicles	
January	94,214	
February	81,503	
March	97,731	
April	148,833	
May	192,076	
June	226,154	
July	206,825	
August	213,279	
September	181,629	
October	158,573	
November	112,559	
December	69,471	
Total		1,782,847

1934:	Total motor vehicles	
January	89,982	
February	143,721	
March	232,485	
April	273,943	
May	256,201	
June	276,111	
Total		1,272,443

Agreed.

[fol. 36] Eightieth. On August 30, 1933, an application for a Code of Fair Competition and a proposed Code of Fair Competition for the Motor Vehicle Retailing Industry were submitted by the National Automobile Dealers Association, through a Committee appointed by them for that purpose, an organization shown to represent approximately 75% of

the members of that industry (later representing approximately 96% of the members of the industry). The proposed Code was referred to members of the Industry and local organizations interested in the Code, and revised by the National Automobile Dealers Association in accordance with suggestions submitted.

Agreed.

Eighty-first. The complainant has been a member of the Brooklyn Motor Dealers Association since January 14, 1925, and was a member in good standing at the time of the institution of this action. The complainant was also a member of the Empire State Association which on behalf of many motor vehicle retail dealers in New York State sponsored the proposed Code of Fair Competition for the Motor Vehicle Retailing Trade. Both said Brooklyn Motor Vehicle Dealers Association and said Empire State Association were members of the National Automobile Dealers Association.

Agreed.

Eighty-second. On September 7, 1933, a proposed Code approved by representative members of the Association was filed with the National Recovery Administration. The filing of the proposed Code was announced by a Press Release #679, which was issued on September 8, 1933, a copy of said release being as follows:

[fol. 37] National Recovery Administration

Immediate Release, September 8, 1933. Release #679

Motor Vehicle Retailing Trade Code

The National Recovery Administration to-day announced that public hearing will be held Monday, September 18, in Department of Commerce Building on the Motor Vehicle Retailing Trade Code filed by the National Automobile Dealers Association, claiming to represent 75% of the total volume of the industry. Deputy Administrator W. R. Lea will preside.

The Code provides a maximum work week of 45 hours, except for salesmen and watchmen, and 52 hours operation for place of business. Maximum hours do not apply to executives and managing employees receiving $25.00 a week

or more, or to emergency workers, but in these cases the average over 6 weeks is not to exceed 48 hours.

Minimum wage is fixed at $15 a week in cities of over 500,000 population, scaled down to $12 a week in towns less than 2,500 population. Full time outside salesmen with unrestricted hours and on commission basis are guaranteed a drawing account of not less than $17.50 a week in cities of 500,000, scaled down to $10 a week in towns of less than 2,500. For mechanics, the minimum wage is 50 cents an hour unless below that rate on July 15, 1929, and in no case less than 30 cents an hour.

Agreed.

[fol. 38] Eighty-third. A public hearing on the proposed Code was set for September 18, 1933, and Notice thereof was mailed to all persons, firms and organizations known to be interested. A copy of said Notice was also placed in all United States Post Offices above the third class and inserted in Trade Journals. A copy was also posted on the official bulletin board of the National Recovery Administration. A copy of said Notice of Hearing is as follows:

"National Recovery Administration

Notice of Hearing No. 99

September 8, 1933.

Motor Vehicle Retailing Trade:

The above industry, as represented by the National Automobile Dealers Association, claiming to represent 75% of the industry has submitted a proposed Basic Code of Fair Competition, copies of which are available at the office of the National Recovery Administration, Room 3316, Department of Commerce, Washington, D. C.

The Code for the Motor Vehicle Retailing Trade in its present form merely reflects the proposal of the above mentioned industry, and noen of the provisions contained therein are to be regarded as having the approval of the National Recovery Administration as applying to this industry.

Notice is hereby given that a Public Hearing on this Code will be conducted by the Administrator, beginning at 10:00 A. M., Monday, September 18, 1935, in the Garden

Room, Mayflower Hotel, Washington, D. C., and continuing until completed. An opportunity to be heard (either in person or by duly appointed representative either by appearance or by sending a written or telegraphic statement) will be given to persons or groups who can show a substantial interest as workers, employers, consumers or otherwise, in the effect of any provision of the proposed Code.

Those wishing to be heard must comply with the following simple requirements:

(1) A written or telegraphic request for an opportunity to be heard must be filed before noon on Saturday, September 16th, 1933, with the Administrator, Room 4034, Department of Commerce, Washington, D. C.

(2) Such request shall state the name of (a) any person seeking to testify in the hearing, and (b) the persons or groups whom he represents.

(3) Such request shall contain a statement setting forth without argument, a proposal: (1) for the elimination of a specific provision of the Code: or (2) a modification of a specific provision, in language proposed by the witnesses, or (3) a provision to be added to the Code, in language proposed by the witness.

[fol. 39] (4) At the Public Hearing, all persons are to be regarded as witnesses, and shall present orally facts only and not argument. Written briefs or arguments may be filed, but oral presentations will be confined to factual statements only.

(5) In the discretion of the Deputy Administrator in charge of the Hearing, persons who have not complied with the requirements of paragraph (1) above, may be permitted at any time prior to the close of the Hearing to file written statements containing proposals for eliminations from, modifications of, or additions to the code supported by pertinent information or argument. Such written statements must be condensed as much as possible.

Public Hearings are solely for the purpose of obtaining in the most direct manner the facts useful to the Administrator, and no arguments will be heard or considered at this time. Representation of interest- parties by attorneys or specialists is permissible, but it is not to be regarded as

necessary. Industry, workers and the consuming public will be represented by special advisers employed by the Government.

R. W. Lea,
Deputy Administrator.

Hugh S. Johnson,
Administrator."

Agreed.

Eighty-fourth. Hearing upon the proposed Code was held on September 18, 1933, in the Garden Room of the Mayflower Hotel, Washington, D. C., with Deputy Administrator R. W. Lea presiding. The meeting was attended by representative delegations from the Industry. Evidence was offered of the Breakdown of the economic functions of the Industry. Proof was furnished that the Industry could not support an increase in the cost of its operation and performance of higher wages and shorter hours unless the destructive price cutting in the form of overallowances granted on trade-ins could be curbed and the resulting depreciation of the capital of the Industry stopped. All representatives, including representatives of labor organizations and all employees in the Industry, were given every opportunity to be heard and afforded ample time to discuss all features of the proposed Code. Briefs from representatives not attending were read into the record.

Disputed. FOUND

[fol. 40] Eighty-fifth. After adjournment of the public hearing a series of conferences between members of the Industry and representatives of the Industry were held with the National Recovery Administration. At these conferences the matter of used car allowances and appraisals were thoroughly investigated by the National Recovery Administration and the proposed Code was thereupon revised in accordance with the findings based upon all of the testimony, both oral and written, introduced during the course of the public hearing and the conferences. The revised Code was thereupon approved by sponsoring associations who represented a majority of the members of the Trade.

Disputed. FOUND

Eighty-sixth: On September 26, 1933, R. W. Lea, Deputy Administrator, submitted a report to Hugh S. Johnson,

Administrator, on the hearing and other proceedings had in connection with the proposed Code and transmitted the final draft of the proposed code with certain findings and the recommendation that the same be approved. A copy of the report of Deputy Administrator Lea is as follows:

"September 26, 1933.

To General Hugh S. Johnson, Administrator.
From R. W. Lea, Deputy Administrator.

I have the honor to submit herewith my report on the Code of Fair Competition for the Motor Vehicle Retailing Trade, the hearings for which were held in Washington, D. C., September 18, 1933, in accordance with provisions of the National Industrial Recovery Act.

The following exhibits are submitted:

1. Final Code submitted.

2. Approvals and Reports of the Industrial, Labor and Consumers Advisory Boards, the Legal Division and the Research and Planning Division.

3. Original letter of transmittal from the Trade.

4. Assent of the Trade to Final Code submitted.

5. Notice of Hearing, and Statement of Procedure.

[fol. 41] 6. List of Witnesses.

7. Constitution and By-Laws of the National Automobile Dealers Association.

8. *Transcript and Appendix.*

In accordance with the customary procedure, every person who filed an appearance was fairly heard. Also, any persons who had failed to file appearance in accordance with the Notice of Hearing, were permitted to file written briefs. All statutory and regulatory requirements were complied with.

The Code is submitted by the National Automobile Dealers' Association, which represents approximately 75% of the Dollar Volume of new and used car sales, and, according to the statement of the Association, approxamitely 75% of the units in the Trade.

From the above, it will be seen that the statutory requirement of sufficient representation has been fully complied with.

Present Condition of Trade

Beginning in 1930, the sales volume in the Motor Vehicle Retailing Trade has shown a steady decline. Sales in 1929, according to the Bureau of Census, were in excess of Six Billion, One Hundred Million Dollars. In 1932, sales amounted to 33⅓% of the 1929 figure, or approximately Two Billion Dollars.

Unsound trade practices have resulted from the dealers efforts to maintain a satisfactory volume of sales. As the result of these practices, it is claimed that approximately 90% of the motor vehicle dealers, empl-ying more than 250,000 workers, are insolvent.

It may safely be said that practically every motor vehicle dealer has developed, as the result of the highly competitive nature of this business, an increasing tendency toward an allowance for a prospective customer's old car greater than it can be sold for. This condition has become increasingly serious, and a ruinous form of price cutting.

Another factor which has been instrumental in bringing about this condition, is the offering for sale by individuals, of cars represented as new, which in fact are not new. Usually they have been driven more than 1,000 miles cross country. These cars are purchased from dealers in distress, and driven to distant points, removed from the place of purchase, frequently at a profit, through carrying passengers for hire, and offered for sale in locations adjacent to an enfranchised dealer for the same make of car, at a price generally below the dealers' cost. This condition is not only serious from the standpoint of the dealers, but also from the consumers, as the cars are misrepresented as new vehicles.

Article I

Purpose

This article needs no discussion.

Article II

Definitions

[fol. 42] The terms "Motor Vehicle Retailing" coyers the retailing, servicing or repairing of both new and used motor vehicles by either new vehicle dealers or used vehicle dealers.

Article III

Employment Regulations

At the conference between the Trade and the Administrator and his advisors, an agreement was reached on the wages and hour provisions which have been incorporated in the Code.

Included among the provisions agreed upon was a provision specifying a guaranteed minimum weekly wage for all productive and office employees, except outside salesmen, regardless of the method of compensation.

A provision guaranteeing outside salesmen a definite weekly drawing account places these employees on a drawing account basis instead of a purely commission basis which had become the practice in recent years.

As the result of the maximum hour limitations specified in the Code, the increase in employment in the Trade will fall somewhere between 10% as estimated by the Trade and 20% as estimated by the Industrial advisors, or increased employment between 26,000 and 52,000 workers.

Provision has been made in the Code for the equitably adjustment of all wages above the minimum.

No person under 16 years of age shall be employed by the Trade.

There is no discrimination between male and female employees.

Employees are protected from declassification with intent to frustrate the purpose of the Code.

Article IV

Trade Regulations

In order to prevent the unsound practices described above, an equitable formula is provided controlling allow-

ances on used cars, which in order not to unduly penalize the consumer, eliminates from consideration in applying the formula such vehicles as are in extremely bad condition as the result of abuses.

Values so determined shall be published every 60 days in an Official Guide.

Contrary to the present custom of charging an arbitrary sum for freight and delivery expenses, the Code provides that only the actual cost of transportation and other delivery expenses shall be charged.

Articles V, VI and VIII

Administration

This Trade is made up of a great number of dealers of two classes, namely new car dealers and independent used car dealers.

Proper representation, for both classes of dealers, has been provided on all administrative committees.

[fol. 43]

Article IX

General

I find that:

(a) The Code complies in all respects with the pertinent provisions of Title I of the Act, including without limitation, sub-section (a) of Section 7, and sub-section (b) of Section 10, thereof; and that

(b) That National Automobile Dealers Association requires no inequitable restrictions on admission to membership therein and is truly representative of the Motor Vehicle Retailing Trade; and that

(c) The Code is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of Title I of the National Industrial Recovery Act.

Conclusion

Giving full consideration to all factors involved in this Trade, and after careful study of the problems from a

broad business viewpoint, I believe this Code effectuates the purposes of the National Industrial Recovery Act, and I therefore recommend its approval.

Respectfully submitted, (S.) R. W. Lea, Deputy Administrator.

Agreed

[fol. 44] Eighty-seventh: On September 29th, 1933, Hugh S. Johnson, Administrator, forwarded the proposed Code, as revised, to the President, with a letter of transmittal recommending the proposed Code be approved. The letter of the Administrator referred to the report of Deputy Administrator Lea which was transmitted to the President. On October 3, 1933, the President approved the Code of Fair Competition for the Motor Vehicle Retailing Trade. A copy of the Administrator's letter of transmittal and of the Executive Order approving the Code are as follows:

Agreed.

"September 20, 1933.

The President, The White House.

My Dear Mr. President:

I have the honor to submit and recommend for your approval, the Code of Fair Competiion for the Motor Vehicle Retailing Trade. The Code has been approved by the Industrial Advisory Board, the Labor Advisory Board, and the Consumers' Advisory Board.

An analysis of the provisions of the Code has been made by the Administration and a complete report is being transmitted to you.

I find that the Code complies with the requirements of clauses 1 and 2, sub-section (a) of section 3 of the National Industrial Recovery Act.

I am, my dear Mr. President,

Very sincerely yours, Hugh S. Johnson, Administrator."

"Executive Order

"An application having been duly made, pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933, for my approval of a Code of Fair Competition for the Motor Vehicle Retailing Trade, and hearings having

been held thereon and the Administrator having rendered [fol. 45] his report containing an analysis of the said Code of Fair Competition together with his recommendations and findings with respect thereto, and the Administrator having found that the said Code of Fair Competition complies in all respects with the pertinent provisions of Title I of said Act and that the requirements of clauses (1) and (2) of sub-section (a) of Section 3 of the said Act have been met:

Now, therefore, I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise do adopt and approve the report, recommendations, and findings of the Administrator and do order that the said Code of Fair Competition be and it is hereby approved.

Franklin D. Roosevelt.

Approval recommended:

Hugh S. Johnson, Administrator.

The White House, October 3, 1933."

Eighty-eighth. Pursuant to Articles V, VI, and VIII of the approved Code there were duly created State Advisory Committees, an Emergency National Committee and the National Control Committee and the membership thereof were selected in accordance with the Code provisions and same duly approved by the National Recovery Administration.

Agreed.

Eighty-ninth. In accordance with and pursuant to the provisions of Article IV of the Code, the United States was separated into certain districts, identified as market areas. For each such district there was established, from statistics obtained through sworn statements furnished pursuant to provisions of the Code by dealers operating within that district, fair used car allowances or appraisal values, such [fol. 46] values being established and made public in accordance with Article IV and Article VII of the Code.

Disputed FOUND

Ninetieth. The complainant has not sought through the agencies provided by the National Recovery Administration for the Motor Vehicle Retailing Trade, either a modifi-

cation, stay or an exemption of any of the provisions contained in the aforesaid Code, including Article IV, Subdivision A of the aforesaid Code.

Disputed. FOUND

Ninety-first. Pursuant to the provisions of Article IV of the Code of Fair Competition, the National Automobile Dealers Association a trade association incorporated under the laws of the State of Illinois, with its principal office in St. Louis, Missouri, compiled an official guide known as the Association Official Guide Book, which said Official Guide Book creates and establishes average prices for used motor vehicles, which said average prices represent the maximum allowance permitted to be paid to prospective purchasers on their used motor vehicles on a trade-in.

Agreed.

Ninety-second. That complainant, in the establishment and conduct of its business, has invested and expended in both physical assets and in the establishment and retention of intangible good will, vast and considerable sums of money which has resulted in the development of a patronage of great monetary value.

Agreed.

Ninety-third. The State of New York, prior to the adoption of Chapter 781 of the Laws of 1933, at no time passed any legislation nor any other regulation regulating the Motor Vehicle Retailing Trade and prohibiting any of the practices which are now prohibited by Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

Ninety-fourth. That the complainant has no adequate remedy at law and can only have relief in a Court of Equity.

[fol. 47] Pursuant to the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

First. On the 16th day of June, 1933, there was duly enacted by the Congress and the President of the United States a law entitled The National Industrial Recovery Act.

Second. The National Industrial Recovery Act was properly enacted by the Congress within the powers granted to it by the Constitution of the United States.

Third. The National Industrial Recovery Act does not violate the Fifth Amendment of the Constitution of the United States.

Fourth. The National Industrial Recovery Act does not violate the Fourteenth Amendment of the Constitution of the United States.

Fifth. In the National Industrial Recovery Act, the Congress has set up a standard for the President's action and it has not abdicated or transferred it- essential legislative functions.

[fol. 48] Sixth. The grant to the President of the United States of the power to approve and enact Codes of Fair Competition for industry is not an unconstitutional delegation of legislative authority.

Seventh. The National Industrial Recovery Act contains a sufficient declaration of the existence of an emergency.

Eighth. The purpose of both the National Industrial Recovery Act and Chapter 781 of the Laws of 1933 of the State of New York was to lessen destructive competition and to curb competitive business practices that were destroying the industrial life of this nation.

Ninth. In the National Industrial Recovery Act Congress legislated on the subject as far as was reasonably practicable. From the necessities of the case Congress was compelled to leave to executive officials the duty of bringing about the results pointed out by the Statute.

Tenth. The National Industrial Recovery Act does not provide for excessive punishment in violation of the Constitution of the United States.

Eleventh. On the 26th day of August, 1933, there was duly enacted by the State of New York a law entitled Laws of 1933 Chapter 781.

Twelfth. Chapter 781 of the Laws of 1933 of the State of New York does not violate either the Constitution of the State of New York, or the Constitution of the United States, or any of the provisions thereof.

[fol. 49] Thirteenth. Chapter 781 of the Laws of 1933 of the State of New York was properly enacted by the State Legislature within the powers granted it by the Constitution of the State of New York.

Fourteenth. The Legislature of the State of New York has power to regulate existing economic evils by proper and appropriate regulations of business.

Fifteenth. Chapter 781 of the Laws of 1933 of the State of New York does not make the National Industrial Recovery Act part of its provisions.

Sixteenth. Chapter 781 of the Laws of 1933 of the State of New York does not violate the Fifth Amendment of the Constitution of the United States.

Seventeenth. Chapter 781 of the Laws of 1933 of the State of New York does not violate the Fourteenth Amendment of the Constitution of the United States.

Eighteenth. Chapter 781 of the Laws of 1933 of the State of New York does not constitute a surrender of State power.

Nineteenth. Chapter 781 of the Laws of 1933 of the State of New York does not violate Article III Section 17 of the Constitution of the State of New York.

Twentieth. Chapter 781 of the Laws of 1933 of the State of New York does not constitute an improper delegation of legislative power.

[fol. 50] Twenty-first. The enforcement of Chapter 781 of the Laws of 1933 of the State of New York does not deny to the complainant due process.

Twenty-second. Chapter 781 of the Laws of 1933 of the State of New York does not provide for excessive punishment.

Twenty-third. Chapter 781 of the Laws of 1933 of the State of New York contains a sufficient declaration of the existence of an emergency.

Twenty-fourth. Through Chapter 781 of the Laws of 1933 of the State of New York the State Legislature legislated on the subject as far as was reasonably practicable.

Twenty-fifth. There is no closed class or category of business that is affected with a public interest.

Twenty-sixth. The retail automobile industry has been adversely affected by economic conditions sufficiently to create an emergency.

Twenty-seventh: The Code of Fair Competition for the Motor Vehicle Retailing Trade was duly approved on the 3rd day of October, 1933, by the President.

Twenty-eighth. That in the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade all the conditions provided both in the National Industrial Recovery Act and by the executive orders issued by the President, were duly complied with.

[fol. 51] Twenty-ninth. On the 5th day of December, 1933, pursuant to the Provisions of Chapter 781 of the Laws of 1933 of the State of New York a certified copy of the Code of Fair Competition for the Motor Vehicle Retailing Trade was duly filed in the office of the Secretary of State of the State of New York in the office of the Department of State thereof, and duly became the standard of fair competition for the Motor Vehicle Retailing Trade within the State of New York.

Thirtieth. The Code of Fair Competition for the Motor Vehicle Retailing Trade is an administrative product of the executive's application of the National Industrial Recovery Act.

Thirty-first. The means selected by the Motor Vehicle Retailing Industry through the provisions of its Code of Fair Competition have a real and substantial relation to the object sought to be attained.

Thirty-second. The Code of Fair Competition for the Motor Vehicle Retailing Trade and Article IV thereof does not constitute a denial of the rights guaranteed by the Fifth or Fourteenth Amendment of the Constitution of the United States.

Thirty-third. The New York State Legislature may adopt the provisions of the National Code for the Motor Vehicle Retailing Trade without further investigation as to details of standards such as those provided in the Code, in its effort to enforce the policy of Congress within the State in intrastate affairs.

[fol. 52] Thirty-fourth. The Code of Fair Competition for the Motor Vehicle Retailing Trade accords all members of the trade equal protection.

Thirty-fifth. Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade is not in violation of or repugnant to the Fifth or the Fourteenth Amendments of the Constitution of the United States.

Thirty-sixth. Price regulation, as provided for in the Code of Fair Competition for the Motor Vehicle Retailing Trade, filed pursuant to Chapter 781 of the Laws of 1933 of the State of New York, does not violate the Constitution of the State of New York.

Thirty-seventh. The price regulation provided by Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade is properly within the scope of the National Industrial Recovery Act and Chapter 781 of the Laws of 1933 of the State of New York.

Thirty-eighth. Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade is a trade practice regulation and comes within the category of approved trade practice regulations that were adopted prior to the enactment of the National Industrial Recovery Act.

Thirty-ninth. Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade is a valid exercise of the power granted by Congress to prescribe such rules and [fol. 53] regulations as may be necessary to effectuate the purpose of the National Industrial Recovery Act.

Fortieth. The used car allowance based on an average of business or of trades in the past is harmonious and founded in fairness.

Forty-first. The method provided in the Code of Fair Competition for the Motor Vehicle Retailing Trade of ascertaining the maximum used car allowance is reasonable.

Forty-second. The method of fixing the trade-in allowances provided for in the Code of Fair Competition for the Motor Vehicle Retailing Trade is not arbitrary or discriminatory, leading by caprice or otherwise to unreasonable discrepancies.

Forty-third. The Code of Fair Competition for the Motor Vehicle Retailing Trade does not place the plaintiff at a disadvantage or effect it adversely.

Forty-fourth. The plaintiff has failed to prove that there are any facts to support its claim that there is an unfair difference between the maximum used car allowance permitted by the Code of Fair Competition for the Motor Vehicle Retailing Trade and the reasonable value of the cars offered for trade-in purposes.

Forty-fifth. None of the provisions of the Motor Vehicle Retailing Trade Code contravene the prohibition against [fol. 54] monopoly or monopolistic practices contained in the National Industrial Recovery Act.

Forty-sixth. The Code of Fair Competition for the Motor Vehicle Retailing Trade and Article IV thereof does not encourage monopolicies or monopolistic practices.

Forty-seventh. The price regulation provided for in the Code of Fair Competition for the Motor Vehicle Retailing Trade does not constitute a monopoly.

Ordered, that judgment be entered accordingly.

Martin T. Manton, Circuit Judge. Robert P. Patterson, District Judge. Murray Hulbert, District Judge.

[File endorsement omitted.]

[fol. 55] In United States District Court, Southern District of New York

[Title omitted]

Supplemental Assignment of Errors—Filed Feb. 19, 1935

Now comes the appellant in the above entitled cause, pursuant to stipulation of the respective parties and the order of this Court dated the 1st day of February, 1935, and files the following supplemental Assignment of Errors, nunc pro tunc, as provided by said order on which it will rely, in addition to the Assignment of Errors heretofore filed, upon the prosecution of the appeal in the above entitled cause,

from the judgment of this Court entered herein on the 18th day of October, 1934:

1. The Court erred in holding and finding that on the 16th day of June, 1933, there was duly enacted by the Congress and the President of the United States a law entitled The National Industrial Recovery Act.

2. The Court erred in holding and finding that The National Industrial Recovery Act was properly enacted by the Congress within the powers granted to it by the Constitution of the United States.

[fol. 56] 3. The Court erred in holding and finding that The National Industrial Recovery Act does not violate the Fifth Amendment of the Constitution of the United States.

4. The Court erred in holding and finding that the National Industrial Recovery Act does not violate the Fourteenth Amendment of the Constitution of the United States.

5. The Court erred in holding and finding that in the National Industrial Recovery Act, the Congress has set up a standard for the President's action and it has not abdicated or transferred it- essential legislative functions.

6. The Court erred in holding and finding that the grant to the President of the United States of the power to approve and enact Codes of Fair Competition for industry, is not an unconstitutional delegation of legislative authority.

7. The Court erred in holding and finding that the National Industrial Recovery Act contains a sufficient declaration of the existence of an emergency.

8. The Court erred in holding and finding that the purpose of both the National Industrial Recovery Act and Chapter 781 of the Laws of 1933 of the State of New York was to lessen destructive competition and to curb competitive business practices that were destorying the industrial life of this nation.

9. The Court erred in holding and finding that in the National Industrial Recovery Act Congress legislated on the subject as far as was reasonably practicable. From the necessities of the case Congress was compelled to leave to executive officials the duty of bringing about the *the* [fol. 57] results pointed out by the Statute.

10. The Court erred in holding and finding that the National Industrial Recovery Act does not provide for excessive punishment in violation of the Constitution of the United States.

11. The Court erred in holding and finding that on the 26th day of August, 1933, there was duly enacted by the State of New York a law entitled Laws of 1933 Chapter 781.

12. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York does not violate either the Constitution of the State of New York, or the Constitution of the United States, or any of the provisions thereof.

13. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York was properly enacted by the State Legislature within the powers granted it by the Constitution of the State of New York.

14. The Court erred in holding and finding that the Legislature of the State of New York has power to regulate existing economic evils by proper and appropriate regulations of business.

15. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York does not make the National Industrial Recovery Act part of its provisions.

[fol. 58] 16. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York does not violate the Fifth Amendment of the Constitution of the United States.

17. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York does not violate the Fourteenth Amendment of the Constitution of the United States.

18. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York does not constitute a surrender of State power.

19. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York does not violate Article III Section 17 of the Constitution of the State of New York.

20. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York does not constitute an improper delegation of legislative power.

21. The Court erred in holding and finding that the enforcement of Chapter 781 of the Laws of 1933 of the State of New York does not deny to the complainant due process.

22. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York does not provide for excessive punishment.

[fol. 59] 23. The Court erred in holding and finding that Chapter 781 of the Laws of 1933 of the State of New York contains a sufficient declaration of the existence of an emergency.

24. The Court erred in holding and finding that through Chapter 781 of the Laws of 1933 of the State of New York the State Legislature legislated on the subject as far as was reasonably practicable.

25. The Court erred in holding and finding that there is no closed class or category of business that is affected with a public interest.

26. The Court erred in holding and finding that the retail automobile industry has been adversely affected by economic conditions sufficiently to create an emergency.

27. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade was duly approved on the 3rd day of October, 1933, by the President.

28. The Court erred in holding and finding that in the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade all the conditions provided both in the National Industrial Recovery Act and by the executive orders issued by the President, were duly complied with.

29. The Court erred in holding and finding that on the 5th day of December, 1933, pursuant to the provisions of Chapter 781 of the Laws of 1933 of the State of New York a certified copy of the Code of Fair Competition for the Motor [fol. 60] Vehicle Retailing Trade was duly filed in the office of the Secretary of State of the State of New York in the

office of the Department of State thereof, and duly became the standard of fair competition for the Motor Vehicle Retailing Trade within the State of New York.

30. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade is an administrative product of the executive's application of the National Industrial Recovery Act.

31. The Court erred in holding and finding that the means selected by the Motor Vehicle Retailing Industry through the provisions of Its Code of Fair Competition have a real and substantial relation to the object sought to be attained.

32. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade and Article IV thereof does not constitute a denial of the rights guaranteed by the Fifth or Fourteenth Amendment of the Constitution of the United States.

33. The Court erred in holding and finding that the New York State Legislature may adopt the provisions of the National Code for the Motor Vehicle Retailing Trade without further investigation as to details of standards such as those provided in the Code, in its effort to enforce the policy of Congress within the State in intrastate affairs.

34. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade accords all members of the trade equal protection.

[fol. 61] 35. The Court erred in holding and finding that Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade is not in violation of or repugnant to the Fifth or the Fourteenth Amendments of the Constitution of the United States.

36. The Court erred in holding and finding that price regulation as provided for in the Code of Fair Competition for the Motor Vehicle Retailing Trade, filed pursuant to Chapter 781 of the laws of 1933 of the State of New York, does not violate the Constitution of the State of New York.

37. The Court erred in holding and finding that the price regulation provided by Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade is properly within the scope of the National Industrial Recovery Act

and Chapter 781 of the Laws of 1933 of the State of New York.

38. The Court erred in holding and finding that Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade is a trade practice regulation and comes within the category of approved trade practice regulations that were adopted prior to the enactment of the National Industrial Recovery Act.

39. The Court erred in holding and finding that Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade is a valid exercise of the power granted by Congress to prescribe such rules and regulations as may be necessary to effectuate the purpose of the National Industrial Recovery Act.

[fol. 62] 40. The Court erred in holding and finding that the used car allowance based on an average of business or of trades in the past is harmonious and founded in fairness.

41. The Court erred in holding and finding that the method provided in the Code of Fair Competition for the Motor Vehicle Retailing Trade of ascertaining the maximum used car allowance is reasonable.

42. The Court erred in holding and finding that the method of fixing the trade-in allowances provided for in the Code of Fair Competition for the Motor Vehicle Retailing Trade is not arbitrary or discriminatory, leading by caprice or otherwise to unreasonable discrepancies.

43. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade does not place the plaintiff at a disadvantage or affect it adversely.

44. The Court erred in holding and finding that the plaintiff has failed to provide that there are any facts to support its claim that there is an unfair difference between the maximum used car allowance permitted by the Code of Fair Competition for the Motor Vehicle Retailing Trade and the reasonable value of the cars offered for trade-in purposes.

45. The Court erred in holding and finding that none of

the provisions of the Motor Vehicle Retailing Trade Code contravene the prohibition against monopoly or monopolistic practices contained in the National Industrial Recovery Act.

[fol. 63] 46. The Court erred in holding and finding that the Code of Fair Competition for the Motor Vehicle Retailing Trade and Article IV thereof does not encourage monopolies or monopolistic practices.

47. The Court erred in holding and finding that the price regulation provided for in the Code of Fair Competition for the Motor Vehicle Retailing Trade does not constitute a monopoly.

48. The Court erred in refusing to hold and find that the Code of Fair Competition for the Motor Vehicle Retailing Trade, is null, void and invalid, having been adopted and approved by the President of the United States in violation of the National Industtrial Recovery Act, more particularly Chapter 1 and Chapter 3a thereof.

49. The Court erred in refusing to hold and find that more particularly Article IV and said Official Guide Book as provided in said Article IV, is invalid, null, void and unconstitutional, being repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the same deprives complainant of its rights, liberty and property without due process of law.

50. The Court erred in refusing to hold and find that Chapter 781 of the Laws of 1933 of the State of New York, is invalid, null, void and unconstitutional, by reason of the illegal manner of enactment, as providing for excessive punishment, as an improper delegation of legislative function in violation of the Constitution of the State of New York, and repugnant to the Fourteenth Amendment of the Constitution of the United States in that it deprives the [fol. 64] complainant of its rights and property without due process of law.

51. The Court erred in refusing to hold and find that Chapter 781 of the Laws of 1933 of the State of New York, the Code of Fair Competition for the Motor Vehicle Retailing Trade, and the Official Guide Book issued pursuant

thereto, are invalid, null, void and unconstitutional in that they deprive the complainant of its rights, liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

52. The Court erred in refusing to hold and find that the National Industrial Recovery Act, the Code of Fair Competition for the Motor Vehicle Retailing Trade and the Official Guide Book are invalid, null, void and unconstitutional in that the National Industrial Recovery Act was enacted by Congress in excess of the power granted to it by the Constitution of the United States, as providing for excessive punishment, as an improper delegation of legislative power by the Congress to the President, and as depriving the complainant of its rights, liberty and property, in derogation and violation of the Fifth Amendment to the Constitution of the United States.

53. The Court erred in refusing to hold and find that the defendant, William C. Dodge, as District Attorney for the County of New York, State of New York, his successors, assistants, deputies, agents and employees be temporarily and permanently enjoined from in any way or manner enforcing against the complainant any of the provisions of [fol. 65] the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly the provisions of Article IV thereof, and any order, rule or regulation that may be issued thereunder or that has been issued thereunder or any of the price regulations fixed and promulgated in the Official Guide Book as provided by Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade or any part or parts thereof, and from instituting or causing to be instituted any suit at law or in equity, prosecution or proceeding or otherwise as the case may be, against the complainant herein for any alleged violation of any of the provisions of the said Code of Fair Competition for the Motor Vehicle Retailing Trade under Chapter 781 of the Laws of 1933 of the State of New York.

54. The Court erred in finding defendant-appellee's Findings of Fact numbered and designated "Twenty-Fifth", "Twenty-Sixth", "Twenty-Seventh", "Twenty-Eighth", "Thirty-Fifth", "Thirty-Sixth", "Thirty-Seventh",

"Thirty-Eighth", "Thirty-Ninth", "Fortieth", "Forty-First", "Forty-Second", "Forty-Third", "Forty-Fourth", "Forty-Sixth", "Fifty-Sixth", "Fifty-Ninth", "Sixty-First", "Sixty-Second", "Sixty-Third", "Sixty-Fourth", "Sixty-Fifth", "Sixty-Sixth", "Sixty-Seventh", "Seventy-Fifth", "Seventy-Sixth", "Eighty-Fourth", "Eighty-Fifth", "Eighty-Ninth", "Ninetieth".

55. The Court erred in failing to find complainant-appellant's proposed Findings of Fact contained in paragraphs numbered and designated "Third", "Fourth", "Sixth", "Eighth", "Ninth", "Eleventh", "Twelfth", "Thirteenth", "Fourteenth", "Fifteenth", "Sixteenth", "Eighteenth", "Nineteenth", "Twentieth", "Twenty-First", "Twenty-Third", "Twenty-Fourth", "Twenty-Fifth", "Twenty-Sixth", "Twenty-Seventh", "Twenty-Eighth", "Twenty-Ninth", "Thirty-First", "Thirty-Second", "Thirty-Third", "Thirty-Fourth".

[fol. 66]

Wherefore, complainant-appellant prays that the judgment of this Court dated the 18th day of October, 1934, which dismissed the Complaint of the complainant-appellant and granted judgment unto the defendant-appellee, be reversed, and that said District Court be directed to enter judgment herein against the defendant-appellee for the relief demanded in the Bill of Complaint herein.

Dated, February 18th, 1935.

Miller, Paul & Placer, Attorneys for Complainant-Appellant, Office & P. O. Address, 276 Fifth Avenue, Borough of Manhattan, City of New York.

[File endorsement omitted.]

[fol. 67] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Transcript

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the an-

nexed papers are true copies of the originals on file in the above Court.

Dated, New York, February 19th, 1935.

Miller, Paul & Placer, Attorneys for Complainant-Appellant. David Blitzer, Harold H. Straus, Attorneys for Defendant-Appellee.

[fol. 68] Clerk's Certificate to foregoing transcript omitted in printing.

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES CO. INC.,
Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,
Defendant-Appellee.

MOTION FOR CONTINUANCE.

Now comes the undersigned, Attorney General of New York State, representing the State of New York, and upon the annexed affidavit of Henry Epstein, Solicitor General, prays that the appeal in the above entitled proceeding, now pending as number 567 on the October 1934 Calendar, be continued and passed to the April Term of this Honorable Court, to be heard with the appeal in the case of United States versus Belcher, now pending as number 628 of the October Term.

All of which is respectfully urged by

JOHN J. BENNETT, JR.,
Attorney General,
New York State,
Office and P. O. Address,
Capitol, Albany, New York,

HENRY EPSTEIN,
Solicitor General,
Solicitors for State of New York.

March 2, 1935.

AFFIDAVIT FOR CONTINUANCE.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES CO. INC.,
Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,
Defendant-Appellee.

State of New York,
County of New York—ss.:

HENRY EPSTEIN, being duly sworn, deposes and says:

Deponent is the Solicitor General of New York State, duly appointed to said position, and is acquainted with the steps heretofore taken in the above entitled action. Deponent is informed that the said appeal is set down to be heard in the March Term of this Honorable Court. The record and briefs of appellant were not received by the Attorney General until February 28th, 1935. The amended or supplemental record was not received until March 1st, containing the findings and conclusions and therein the said findings were not in all cases noted as "found" or "refused". It has been necessary to correct the same since receipt of the said supplemental transcript. It will be extremely difficult, if not impos-

sible, for the Attorney General adequately to brief said matter for argument this Term.

Conference with representatives of the National Recovery Administration reveals that the case of United States versus Belcher will appear on the April Calendar, also involving the National Industrial Recovery Act and its Constitutional validity. By passing the pending appeal, which involves a State Act (Chapter 781, L. 1933, New York) in aid of the National Industrial Recovery Act, to the April Term, the Solicitor General of the United States will be afforded an opportunity to intervene herein as amicus if he so desires, and will bring both cases, with complementary phases of the entire National Industrial Recovery Act, before the Court at one time.

There is a further and weighty consideration to the above reasons. The Court of Appeals of New York now has pending before it the case of Sabatini versus Andrews, wherein the validity of the State Statute is questioned and wherein the Appellate Division of the Supreme Court, First Department, sustained the State Act. There is pending in the Appellate Division, Third Department, an appeal in Darweger versus Staats, et al., in which the lower court declared the State Act invalid. A decision in the latter is momentarily expected and an appeal will probably be heard in the Court of Appeals in March, preparations by both parties having been made to that end. By passing the instant appeal, this Honorable Court will have the advantage of a determination of the State's highest court on a State Statute under the State Constitution, which is the basic issue presented herein.

The State of New York, by its Governor, was served with proceedings in the within action; one of its statutes is attacked; the Attorney General ap-

peared, was deemed a party and was heard in the Statutory Court below. It is respectfully urged that like consideration be accorded its within petition for a continuance.

All of which is submitted in support of the petition herein.

HENRY EPSTEIN,
Solicitor General,
New York State,
Solicitor.

Sworn to before me this
2nd day of March, 1935.

JOHN J. MANGAN,
Notary Public.
N. Y. Co. Clk. No. 337, Reg. No. 5-M-240.
Kings Co. Clk. No. 86, Reg. No. 5333.
Term expires March 30, 1935.

4

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567

SPIELMAN MOTOR SALES CO., INC., *Appellant*,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York, *Appellee*.

OPPOSITION OF APPELLEE TO MOTION TO POSTPONE ARGUMENT.

DAVID BLITZER,
HAROLD H. STRAUS,
KARL D. LOOS,
Counsel for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567

SPIELMAN MOTOR SALES CO., INC., *Appellant*,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York, *Appellee.*

OPPOSITION OF APPELLEE TO MOTION TO POSTPONE ARGUMENT.

Now comes the appellee in the above entitled cause, by the undersigned counsel, for the purpose of opposing a postponement of the oral argument, for the reasons hereinafter shown:

1. Appellee is advised that the Attorney General of the State of New York, acting for and on behalf of the Governor of New York, will submit a motion to this Court not later than Monday, March 4, 1935, seeking to have the argument in this cause postponed and continued until the month of April, 1935, in order that this case may be argued together with the case of *United States v. W. E. Belcher*, No. 628, October Term, 1934.

2. The issue involved in the present case is the validity of the State Recovery Act of the State of New York and certain trade practice provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade and of the National Industrial Recovery Act. The case of *United States v. W. E. Belcher* involves the hours and wages provisions of the Code of Fair Competition for the lumber industry, which are not in question in the present case. The only similarity between the two cases is that they both arise under legislation seeking National recovery.

3. Appellee's brief is now being printed and counsel for appellee are ready to argue this case when it is reached in due course, which, we understand, will be sometime during the week of March 4, 1935.

4. Appellant has filed its brief and we are advised that it will also oppose this motion for a postponement.

5. The uncertainty which will continue while this case is pending is causing difficulty in the administration of the Motor Vehicle Retailing Code and appellee, the Code Authority, and the Motor Vehicle Retailing Trade generally, are anxious to avoid any delays in the progress of this case to a final determination.

Wherefore, it is prayed that the motion of the Attorney General of the State of New York for a postponement of the argument in this case may be denied.

Respectfully submitted,

DAVID BLITZER,
HAROLD H. STRAUS,
KARL D. LOOS,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 567

SPIELMAN MOTOR SALES CO., INC.,

Appellant,

vs.

WILLIAM C. DODGE, AS DISTRICT ATTORNEY OF NEW YORK COUNTY, STATE OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION BY APPELLANT, UNDER RULE 12.

In support of the jurisdiction of this Court to review the above entitled cause on appeal, appellant respectfully submits the following statement:

A. Statutory Provisions.

Judicial Code, Section 266; U. S. Code, Title 28, Section 380.

The validity of Chapter 781 of the laws of 1933 of the State of New York; the National Industrial Recovery Act, 48 Stat. 195, being part of Title 15 of the United States Code and part of Title 15 of the U. S. C. (Commerce and Trade) being Sections 701-712, inclusive, and the Code of Fair Competition for the Motor Vehicle Retailing Trade, adopted pursuant thereto, are involved herein.

B. Dates of Orders Sought to Be Reviewed and Date of Application for Appeal.

The order sought to be reviewed herein was entered on the 18th day of October, 1934.

The petition for appeal was presented on November 10, 1934, together with an Assignment of Errors.

C. Nature of Case and Rulings Below.

Appellant Spielman Motor Sales Co., Inc., brought suit in the United States District Court for the Southern District of New York to restrain and prohibit the defendant, William C. Dodge as District Attorney of New York County, State of New York, from proceeding with a threatened prosecution of the complainant-appellant for an alleged violation of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade adopted pursuant to the provisions of the National Industrial Recovery Act and made part of the laws of the State of New York pursuant to the provisions of Chapter 781 of the laws of 1933 of the State of New York.

The petition alleged that Chapter 781 of the Laws of 1933, the National Industrial Recovery Act and the Code of Fair Competition for the Motor Vehicle Retailing Trade adopted pursuant thereto and made part of the law of the State of New York by virtue of Chapter 781 of the laws of 1933 of the State of New York, were invalid, null, void and

unconstitutional under both the New York State Constitution and the Federal Constitution, more particularly but not exclusively, the Fourteenth Amendment of the United States Constitution and the Fifth Amendment of the United States Constitution.

Notice of application for a temporary injunction to be heard on the 7th day of August, 1934, was duly served by the complainant-appellant upon the defendant-appellee. Said application was heard before a Court of three Judges organized pursuant to the Statutory provisions of U. S. C. Title 28, Section 380 on the 16th day of August, 1934. Thereafter and on the 18th day of October, 1934, the District Court entered an order denying the application of the complainant-appellant for a temporary injunction and dismissed the bill of complaint from which order this appeal is being taken within thirty days from the rendition thereof.

The complainant-appellant alleges by its assignment of errors filed herewith that the District Court convened pursuant to U. S. C. Title 28, Section 380, erred in denying the application of the complainant-appellant for a temporary injunction as a matter of law and that it erred in failing to hold the statutes cited above unconstitutional, null and void.

D. Cases Sustaining the Jurisdiction of This Court of This Appeal.

Tyson v. *Banton*, 273 U. S. 418;
Packard v. *Banton*, 264 U. S. 596;
Terrace v. *Thompson*, 216 U. S. 194;
Truax v. *Raich*, 239 U. S. 36;
Hegeman Farms Corporation v. *Charles H. Baldwin* (No. 27, October Term, 1934, Decided November 5, 1934, United States Supreme Court, not officially reported yet).

We therefore respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

MILLER, PAUL & PLACER,
Solicitors for Complainant-appellant,
O. & P. O. Address: 276 Fifth Avenue,
Borough of Manhattan, City of New York.

(5731-C)

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES CO. INC.,
Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,
Defendant-Appellee.

COMPLAINANT-APPELLANT'S BRIEF.

Statement.

The opinion of the Statutory Court in this case is reported in 8 Fed. Supp. 437, Advance Sheets, December 10th, 1934 (R. 265).

The Facts.

Appellant commenced the above action for a permanent injunction restraining and enjoining the defendant herein, the District Attorney of New York County of the State of New York, from carrying out a threat to criminally prosecute the appellant for the alleged violation of the provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade (Exhibit A, R. 16). The alleged violation constitutes a misdemeanor under the laws of the State of New York, by virtue of Chapter 781 of the Laws of 1933 of the State of New York, commonly known and designated in said State as the "Schuckno Act" or the New York State Industrial Recovery Act (Exhibit

B, R. 33). The said Act provides for punishment of any violation of any Code of Fair Competition, at the rate of $500 for each violation, and is cumulative in that each day of violation constitutes a separate crime (R. 34).

The basis of said action is that the said "Schackno Act" and the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly the provisions of Article IV of said Code, are void, invalid and unconstitutional, being in contravention and derogation of the United States Constitution, more particularly the Fourteenth Amendment thereof.

Jurisdiction of this cause is based upon the following authorities:

Tyson v. *Banton*, 273 U. S. 418;
Packard v. *Banton*, 264 U. S. 140;
Terrace v. *Thompson*, 263 U. S. 197;
Truax v. *Raich*, 239 U. S. 33;
Cavanaugh v. *Looney*, 248 U. S. 453;
Ex Parte Young, 209 U. S. 123.

In addition to having raised a Federal Constitutional question, the appellant raised a local Constitutional question, contending that the threatened prosecution under said "Schackno Act" was violative of its constitutional rights under the New York State Constitution, in the manner which will be more fully discussed in this brief, and by virtue thereof, vested the District Court with power to determine all the questions in the case, local as well as federal. This is in accordance with the decisions of this Court:

Louisville & N. R. Co. v. *Garrett*, 231 U. S. 298;
Van Dyke v. *Geary*, 244 U. S. 39;
Siler v. *Louisville & N. R. Co.*, 213 U. S. 175.

Simultaneously with the institution of the action, appellant, by Order to Show Cause (R. 3) moved before the

District Court for a preliminary injunction, on notice to the defendant-appellee, the Attorney General, and the Governor of the State of New York, pursuant to the provisions of Section 380, Title 28, of the United States Code.

A statutory court of three Judges, consisting of one Judge of the Circuit Court of Appeals, Second Circuit, and two District Judges, was duly convened to hear and determine the said application for a preliminary injunction. The appellee moved simultaneously to dismiss the Bill of Complaint.

The statutory Court, thus convened, rendered its opinion wherein it denied the appellant's application for a preliminary injunction, and granted the appellee's motion to dismiss the Bill of Complaint. A final decree was entered accordingly.

After an appeal was duly taken to this Court, by Order allowing the appeal (R. 274), based upon an Assignment of Errors, and a transcript of the Record filed with this Court, it was determined by Counsel for the respective parties to the action, as well as Counsel to the Attorney General and Counsel to the Governor of the State of New York, that the preliminary hearing be deemed a final hearing on the merits, and that the respective affidavits and exhibits submitted by the parties hereto on the application for a preliminary injunction, be deemed the testimony of the respective affiants as though the said affiants had orally testified with respect to the facts contained in their respective affidavits and exhibits.

It was agreed by written stipulation, upon which an order was duly entered and made part of the Record on this appeal, that Findings of Fact and Conclusions of Law be submitted to the said statutory Court and the Findings of Fact and Conclusions of Law made part of this Record, to sustain the final decree granted herein. This procedure was in reliance upon the decision of this Court in *Borden* v. *Baldwin*, 79 Law Ed. 130, No. 296, October Term 1934.

The appeal, therefore, is before this Court, from a final decree in favor of the appellee, based upon Findings of Fact and Conclusions of Law, in order that there may be a final determination of this case on the merits.

* * * * * * *

The appellant is engaged in the retail sale of new automobiles, more particularly the products of the Chevrolet Motor Company, and has been so engaged since 1923. It employs eighty employees and transacts its business in five localities all within the City and State of New York (R. 4, 5). In the establishment and conduct of its business, the appellant has expended vast and considerable sums of money, time and effort and has developed a good will among its customers and patrons of immeasurable value.

Subsequent to the enactment of the National Industrial Recovery Act, and on the 26th day of August, 1933, Chapter 781 of the Laws of 1933 of the State of New York, came into effect. The entire Act appears in the Record as Appellant's Exhibit B, at page 33.

Allegedly pursuant to the provisions of the National Industrial Recovery Act, a Code of Fair Competition for the Motor Vehicle Retailing Trade, which is set forth in full, beginning at page 16 of the Record, was approved by the President of the United States on October 3rd, 1933, to become effective November 1933. Subsequently, and on or about the 3rd day of December, 1933, a certified copy of the said Code of Fair Competition was filed in the office of the Secretary of State of New York, pursuant to the provisions of Chapter 781 of the Laws of 1933 of the State of New York, and pursuant thereto, became "the standard of fair competition" for the automobile retail trade in the State of New York.

On the 7th day of July, 1934, the defendant, as District Attorney of New York County of the State of New York, openly, publicly and admittedly threatened and proclaimed to the appellant that he was preparing to crimi-

nally prosecute the appellant by reason of the alleged violation of Article IV, Subdivision A, and also for the alleged violation of Article IV, Subdivision B, Paragraphs 1 and 2 of the Code of Fair Competition for the Motor Vehicle Retailing Trade. The entire Code is set forth as Exhibit A, and appears in the Record at page 16.

By the provisions of Article IV, Subdivision A, an automobile dealer is prohibited from allowing to a prospective customer on a trade-in automobile, a value in excess of a maximum figure established and ascertained as provided by the provisions of Article IV, Subdivision A, of the Code.

Article IV, Subdivision B, paragraph 1 thereof, prohibits an automobile dealer from selling a new car at retail to a customer for less than factory list price, plus certain extra charges for equipment, transportation, etc. Paragraph 2 of the said Subdivision, prohibits a dealer from giving "any discount, gratuity, commission, service or accessory, to a customer or his agent, for the purpose of inducing a customer or his agent to purchase a car".

When these threats were made, this action was commenced to restrain the District Attorney from carrying out the said threat to criminally prosecute the appellant for the said violation, on the ground that said prosecution, if culminated, would deprive the appellant of its constitutional rights guaranteed to it by the Constitution of the United States, more particularly but not exclusively the Fourteenth Amendment thereto, and the New York State Constitution.

Tyson v. *Banton*, 273 U. S. 418;
Packard v. *Banton*, 264 U. S. 140;
Terrace v. *Thompson*, 263 U. S. 197;
Truax v. *Raich*, 239 U. S. 33;
Cavanaugh v. *Looney*, 248 U. S. 453;
Ex Parte Young, 209 U. S. 123.

POINT I.

The National Industrial Recovery Act is unconstitutional.

A. The matters sought to be regulated therein are beyond the constitutional jurisdiction of Congress, and no warrant of authority exists in Congress to regulate the subject matter embraced therein.

The powers granted unto Congress are specifically enumerated in the Constitution (Article 1, Section 8 of the United States Constitution), and those powers not expressly granted nor implied therefrom, are reserved to the respective states and the people and may be exercised only by them by virtue of the Ninth and Tenth Amendments to the Constitution.

McCullough v. *Maryland*, 4 Wheat. 316;
In re Rahrer, 140 U. S. 545;
Turner v. *Williams*, 194 U. S. 295;
Keller v. *United States*, 213 U. S. 138;
Martin v. *Hunter's Lessee*, 14 U. S. (1 Wheat.) 304;
Newberry v. *United States*, 256 U. S. 232.

Any legislation by Congress, beyond the limits of the powers expressly delegated to it or implied therefrom, would be trespassing upon the respective rights of the States or the people, and would therefore be in direct contravention of the supreme law of the land.

Gordon v. *United States*, 117 U. S. 705;
Civil Rights Cases, 109 U. S. 3.

We must therefore be confined to the precise powers expressly granted to Congress or logically implied therefrom

to determine the existence of the power of Congress to legislate in the particular respects found in the National Industrial Recovery Act (Title 15 of the United States Code) (48 Stat. 195).

In the Act herein challenged, by its declaration of policy, the Congress stated:

> "It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; *and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervisions, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.*" (Italics the writers.)

It will be observed that in this declaration of policy, the only subject matter over which Congress has legislative authority is the subject matter of interstate and foreign commerce (Section 8, Article 1 of the United States Constitution). It will be further observed that in declaring a purpose to provide for the general welfare the declaration of policy encompassed a vast field over which the Congress does not have any authority under the Constitution to legislate, either express or implied. It seems to have been the opinion of the author of the Act that the use of the words "provide for the general welfare" as introductory

to this vast sweep of power, would be sufficient justification of Congressional legislation. Undoubtedly the author was attempting to outline a legislative policy resting for its authority upon the general welfare clause of the Constitution, for certainly no student of the Constitution would say the Congress had authority under the Constitution, either express or implied, to promote the organization of industry generally, or cooperative action among trade groups, or to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, or to promote the fullest possible utilization of present productive capacity or industries, or to avoid undue restriction of production, or to increase the consumption of industrial and agricultural products by increasing purchasing power, or to reduce or relieve unemployment, or to improve standards of labor or otherwise rehabilitate industry and conserve natural resources. If, in some of these declared objectives, there were an element of interstate commerce clearly definable, the legislative authority of the Congress as to that might be justified; but there was no effort and apparently no purpose to distinguish in this declaration of policy the subjects which the Congress had constitutional authority to deal with and those which it did not have such constitutional authority to deal with.

Section 2, sub-division (a) of Title I provides that:

> "To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the provisions of the civil service laws, such officers and employees and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities,

duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended to fix the compensation of any officers and employees so appointed."

The single reference to anything which might be called a definition of subject-matter of the so-called legislation is one in which the language is used, "to effectuate the policy of this title". In other words, having declared a policy which specifically and inevitably goes outside of the field of interstate commerce and reaches and ramifies trade, industry, competitive practices, productive capacity, consumption of industrial and agricultural products, increased purchasing power, unemployment, standards of labor and the rehabilitation of industry it does not further distinguish or specify these subjects which it proposes legislatively to deal with, but simply declares that this policy shall be carried out by the President of the United States.

In Section 3 of Title I, under the head of "Codes of Fair Competition", it is provided that:

"Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title; *Provided*, that such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code

> or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared."

Clearly, this does not in the slightest degree limit the operation of the Act or the activity of the President, or the agencies which he may set up, to interstate commerce; *but clearly it comprehends all the classes of commerce, local, intrastate and interstate.*

Section 3 further provides:

> "(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended."

The object of this sub-division apparently was to place under the jurisdiction of the Federal Trade Commission those violations of code or codes which affected interstate

or foreign commerce, and the very fact that this sub-division (b) provides

> "Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended";

indicates clearly that the whole subject-matter was the whole of commerce, local, intrastate and interstate, and that it was the object of the author of the Act to segregate the transactions affecting interstate or foreign commerce from all other kinds of commerce and place them within the jurisdiction of the Federal Trade Commission Act. This will be made more manifest by the next sub-division of Section 3, which provides:

> "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of *any* code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

Here the Act reverts again to the *whole field of commerce and industry,* invests the District Courts of the United States with jurisdiction to prevent and restrain the violation of any code of fair competition and empowers the United States District Attorneys to institute proceedings to prevent and restrain such violations. *There is no distinction made in the sub-division between the classes of commerce, intrastate and interstate.*

It has been claimed and was so announced at the beginning, that this whole Industrial Recovery Act was permissive in character and the introductory section, under the

title "Codes of Fair Competition", seems to have misled many into the belief that the application to the President by any trade or industrial association or group was optional and that it was a voluntary, cooperative plan, receiving governmental sanction and creating what has been called a "partnership with the government". But the next subdivision of Section 3 sets all of that at rest, for it provides:

> "Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent *in any trade or industry or subdivision thereof*, and if no code of fair competition theretofore has been approved by the President, the President, after such public notice and hearing as he shall specify, *may prescribe and approve* a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section." (Italics the writer's.)

Here the glove comes off and you see the iron hand, because "upon his own motion" the President, in any trade or industry, interstate, intrastate, intercounty, intercity—or any subdivision thereof—may prescribe a code which shall have the same effect as that which we were taught to believe was a permissive code by the voluntary cooperation of trade and industry.

Subdivision (f) is the penal provision and provides:

> "When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or effecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500

for each offense, and each day such violation continues shall be deemed a separate offense."

Again there is a reference to interstate and foreign commerce, and apparently the author of the Act did not dare to provide a penalty for violations of any code except a code which related to interstate or foreign commerce. Just as in the case of Subdivision (b), when it was sought to fix jurisdiction in the Federal Trade Commission, the author of the Act limited the violations to those effecting interstate and foreign commerce.

Section 7, in Subdivision (b), provides:

"The President shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry or subdivision thereof with respect to which the conditions referred to in clauses (1) and (2) of subsection (a) prevail, to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President under subsection (a) of Section 3."

In subdivision (c) of Section 7, it is provided:

"Where no such mutual agreement has been approved by the President he may investigate the labor practices, policies, wages, hours of labor, and conditions of employment in such trade or industry or subdivision thereof; and upon the basis of such investigations, and after such hearings as the President finds advisable, he is authorized to prescribe a limited code of fair competition fixing such maximum hours of labor, minimum rates of pay, and other conditions

of employment in the trade or industry or subdivision thereof investigated as he finds to be necessary to effectuate the policy of this title, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of section 3. The President may differentiate according to experience and skill of the employees affected and according to the locality of employment; but no attempt shall be made to introduce any classification according to the nature of the work involved which might tend to set a maximum as well as a minimum wage."

Thus, in Subdivision C of Section 7, interstate and foreign commerce disappear from the vision of the reader and from the pen of the author, and the President is empowered, on his own motion, to investigate the labor practices, policies, wages, hours of labor and conditions of employment in any trade or industry, or subdivision thereof, whether it be intrastate commerce or interstate commerce, or local commerce, and if he finds it advisable he is authorized to prescribe what is called a limited code of fair competition, fixing the hours of labor, the minimum rates of pay and the conditions of employment in the trade or industry investigated, as "he finds to be necessary to effectuate the policy of this title, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of section 3".

To put it briefly and bluntly, the Act purports to deal with all commerce, industry, labor and business, but it prescribes penalties and punishment only in transactions affecting interstate or foreign trade and commerce. It is a matter of common knowledge that every class and kind of business has been subjected to regimentation. All classes of business, local, intrastate and interstate, by the Act are swept up into the very hands of the President of the United

States, for that sort of control and regimentation as in his wisdom or the wisdom of his nominee seems advisable, and the only differentiation between interstate and foreign commerce and all other classes of business and commerce is with respect to penalties, licenses and Federal Trade Regulation which only apply to interstate and foreign commerce. The act, as an Act of the Congress, deals as fully and as drastically and completely with local and intrastate commerce, in so far as its regulation is concerned, as it does with interstate and foreign commerce, and therefore falls directly within the prohibition so well defined in the case of *Martin* v. *Hunter's Lessee,* 14 U. S. (1 Wheat.), 304, 326, in which the Supreme Court said:

> "The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

This language was quoted in *Newberry* v. *United States* 256 U. S. 232, 249.

An effort has been made to justify the far reaching and sweeping legislation which the Congress embodied in the Act by saying that, in effect, all business, even though local and intrastate, and transactions therein, affects interstate commerce and that, therefore, the Act is constitutional because, in effect, all business, even though local or intrastate, does affect interstate commerce and thereby confers jurisdiction upon Congress to deal with all classes of business.

The Constitution, Article 1, Section 8, provides:

> "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes."

Thus we find in the famous "Child Labor" case of

Hammer v. *Dagenhart*, 247 U. S. 251, 272, the law stated to be as follows:

> "The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. *'Pipeline'* cases, 243 U. S. 548, 560. The maintenance of the authority of a state over matters purely local is as essential to the preservation of our existence as is the conservation of the supremacy of the Federal power in all matters entrusted to the nation by the Federal Constitution. In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are served. *Lane County* v. *Oregon*, 7 Wall. 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise is inherent and has never been surrendered to the general government. * * * This Court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge harmoniously with the other the duties entrusted to it by the Constitution."

Though the facts in the foregoing case clearly established a well recognized evil of child labor, the power of Congress to remedy such condition in the name of interstate commerce, was denied to it by this Court.

It is respectfully submitted that the decision of this Court in *Hammer* v. *Dagenhart* (*supra*), is the most insurmountable obstacle to sustaining the Act under the purported power of Congress to regulate interstate commerce.

Such unlimited grant of power exemplified in the Industrial Recovery Act was denied by this Court in the case of

Hooper v. *California*, 155 U. S. 648. In that case, the Court laid down the succinct rule with respect to the power of Congress over interstate commerce. It stated:

> "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature."

Similarly, in *Kidd* v. *Pearson*, 128 U. S. 1, this Court held:

> "Manufacturing is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different * * *. If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining;—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago?"

Although this statement was uttered in a case involving state power, we assume that it is unnecessary to labor the point that the so-called "New Deal" conception of the com-

merce clause is a far cry from the above quoted doctrine endorsed by a unanimous Supreme Court.

The National Industrial Recovery Act and the Codes promulgated thereunder, are admittedly a novelty and regarded by all as an "economic experiment". That its scope is not limited to interstate commerce has been professed by its most ardent supporters, and it is a matter of common knowledge that the provisions of the Codes do not stop with interstate commerce or with those trades or industries that are interstate in character. There is even no pretense to such limitation.

Senator Robert F. Wagner, the proponent and protagonist of the bill, in expounding upon the same before the Senate Finance Committee, stated the following:

> "But where the entire economic structure is down and is in a depressed state, the only way we can lift it up and have our economic structure survive is by enabling business as a whole, to lift it up, and that is needed in order to bring about economic recovery. Then, I say, *let all business be regarded as affected by the public interest which justifies governmental intervention.* * * * *And it is equally true that many commercial and industrial practices which in normal times would have only intrastate significance are magnified to national importance during a period of severe strain, and burden interstate commerce.* To some it may appear that we are venturing far from the original purposes which guided the Fathers of our Constitution. In sober truth, we are acting under the compulsion of the economic situation." (Italics ours.)

At such time the following senatorial exchange occurred:

Senator Wagner:

> "The philosphy of this bill is to encourage volun-

tary action and initiative on the part of industry and I doubt whether or not these compulsory methods will be used at all except on very rare occasions; but if you are going to lift the standard, you have got to have some sanctions in order to enforce the code that may be adopted."

Senator Gore:

"* * * My point is why in a free country a free man ought to be required to take out a license to engage in legitimate industry and why somebody under our Constitutional system should be given the power to destroy the value of his property, which you do when you bring about a situation where he cannot operate. That seems to me approaching the point of taking property without due process of law."

Senator Clark:

"Senator, do you think that the mere declaration of emergency would make an act constitutional that otherwise would be unconstitutional? You said it could be done in an emergency?"

Senator Wagner:

"No; but I think the powers exercised under the Constitution may have a wider use for governmental activity than in normal times. I mean, if I may say again, we may now regard that all business is affected with the public interests in an emergency, where, perhaps if the emergency did not exist, courts might not justify our going as far as that."

Senator Gore:

"This act if passed will mean that the Constitutional rights of a citizen and the Constitutional power of a government will vary with the variation of economic conditions and the state of mind of those in authority?"

Senator Wagner:

"I think that has always been the philosophy of the law."

When recourse is had to the activities of the Federal Government, it will be found that in the course of the enforcement of the various Codes approved under the National Industrial Recovery Act, the Federal District Attorneys have hurdled all State lines and bars and by way of criminal indictment and equity injunctions, have sought the enforcement of purely local business following through the arguments of the promulgators of the Act and Codes.

We find in the following reported decisions, that without exception, attempts have been made to regulate strictly local business on the far fetched conception that all business in times of so-called emergency, affect interstate commerce. We respectfully cite but a few of the prosecutions and injunctive proceedings all of which have been decided against the Federal Government by the lower courts.

United States v. *Suburban Motor Service Corp.*, 7 Fed. (Supp.) 798;

United States v. *Lieto*, 6 Fed. (Supp.) 32;

United States v. *Mills*, 7 Fed. (Supp.) 547;

Hart Coal Co. v. *Sparks*, 7 Fed. (Supp.) 16;

Purvis v. *Bazemore*, 5 Fed. (Supp.) 230;

Irma Hat Co. v. *Local Retail Code Authority*, 7 Fed. (Supp.) 687;

United States v. *Eason Oil Co.*, 8 Fed. (Supp.) 365;

United States v. *Sutherland*, U. S. Dist. Ct. Western Dist. of Missouri Western Division in Equity No. 2552, Dec. 27, 1934 (not yet officially reported—see Prentice Hall Trade & Industry Service, p. 8552);

United States v. *Kinnebrew Motor Co.*, 8 Fed. (Supp.) 535.

In *United States* v. *Lieto*, 6 Fed. Supp. 32, the District Court dismissed the contention that under the guise of the power to regulate interstate commerce, all businesses may be regulated by Congress under the legislation found in the National Industrial Recovery Act. While not conclusive upon this Honorable Court, the language of the lower Court so successfully disrupts the arguments of the Federal Government in support of the alleged power, that we feel it should be quoted:

> "* * * Now the national government has a right to do anything it can, and it is the business of that government to do anything it can to relieve that emergency, provided that which it does is within its power to do. Local business; business confined exclusively to a state; business which does not impinge upon or affect, or disturb interstate commerce, is wholly beyond the fingers of the national government. Such business is amenable to the local government. The fundamental laws of the land preserve and recognize both sorts. The very charter of the national government proclaimed the continuity of the power of the people and of the power in the states. The power that rests and remains with the citizen and with the state is as sovereign and unamenable to attacks from the national government as is the power of the national government sovereign and immune from any act of the state. Each must retain this separateness, and, this distinctness, and, this independence in order to preserve the autonomy of the American system. The system is itself of infinite value. Experiments in the governmental field in other countries, as exhibited in history, drove the fathers to the thought, and keep us true to it, that a government such as is ours must have a dual system. That is a national and a state system. Our country is too large, sections are too remote, interests are too diversified, liberties are too numerous and

valuable, and, the activities of the people are too multiplied to permit a congestion of all power in the national seat."

And further:

"It has been thoughtfully suggested that the newspaper which we read in the morning is the physical product of far away jurisdictions. That the food which is eaten on the table of the citizen comes from many climes. That the clothes that give the body its respectability and health and which preserve it from the rigors of the climate and elements is not always local in conception. To grant the proposition that one who sells an apple in a stand on a street in the city of Dallas for a less amount than the price fixed by a code which relates to sale of fruit, because that apple may have been raised in Oregon or in New Mexico, or because the hand that delivers it to the purchaser and receives a nickel therefor, is the hand of a humble employee who gets less than a nationally fixed wage, it seems to me would be stretching the power of the National government beyond apology. What may be said, then, of a criminal law which punishes a Texan for selling that which came out of Texas earth and has never been elsewhere?"

The mental giant in the fineness of logic may trace a connection between a puff of the breath as an augmentor of the passing wind, or between the light of the burning coal and the primal rays of the sun, but, that sort of a fineness in scientific reasoning may not be carried into the practical execution of the criminal law for the purpose of showing a connection between someone who sells an apple or a suit of clothes or a newspaper or a gallon of gasoline so as to therefrom argue a direct effect upon interstate commerce."

In *Hart Coal Co.* v. *Sparks*, 7 Fed. Supp. 16, the Federal District Court expressed itself thusly:

> "The scheme of regulation of the strictly local affairs of the citizens of the country, attempted to be set up and enforced under the Recovery Act, has no place in our system of government, and it is futile for its defenders to attempt to justify it on constitutional grounds. No such justification can be found. It is the boldest kind of usurpation—dared by the authorities and tolerated by the public only because of the bewilderment of the people in the present emergency. Every person at all familiar with the Constitution and our scheme of government under it knows that no such power exists, and its mere academic assertion would be amusing, but its determined exercise is tragic. In the exercise of this claimed power, the National authorities have reached out and by Codes and other regulations are attempting to regulate every conceivable character of local business—the tailor in his shop, the merchant in his store, the blacksmith at his forge, the coal operator and the manufacturer. Apparently, none of the activities of man are acknowledged as beyond its reach. If the existence of such a power in the National government be admitted, it means the end of constitutional government in this country, under which individual effort and initiative have been fostered and encouraged, and the people generally have enjoyed a degree of liberty of person and security of property unknown to the rest of the world. I know of no higher duty of the National Courts, the judges of which are sworn to support and defend the Constitution of the United States, than to strike down such an unwarranted invasion of the reserved powers of the States and the rights of the people."

The Courts have zealously guarded the distinction be-

t ·en the State's police power and the right of Congress to legislate with respect to interstate commerce.

Hannibal R. R. v. *Fusen*, 95 U. S. 465;
In re Rahrer, 140 U. S. 545, 554.

Bearing in mind the essential distinctions between what a State may do and what a Federal Government may do, remembering that the foundations of this Government are predicated upon the fact that certain powers have been delegated to Congress and that others remain with the States, it is submitted respectfully that the judiciary should be equally as jealous of Congressional invasion of state rights through the medium of mere lip service to the formula that a particular Congressional Act concerns itself with interstate commerce.

Thus, mere introductory apologies to an Act attempting to bring it within the express powers granted to Congress, cannot save the same where the manifest right to legislate with respect to the particular subject matter, does not exist.

Congress has clothed the act in the well-known garb recognized as necessary for the proper protection of all similar congressional legislation having as its purpose the regulation of commerce between the States, but those entrusted with the duty of guarding the rights of those affected must strip the act of the fine feathers which adorn it and thus, while it stands naked before the bar of justice, pass upon its substance, rather than its form.

Whatever may be the express wording of the act with respect to interstate commerce, the intent and mechanics of the same is to put the Government into business. By legislative fiat, State lines have been wiped out so that the established principle of using the crossing of a State line as the guide for determining whether or not interstate business is affected, has been discarded completely.

"Free flow of commerce" in the past has meant that the stream of industry over State lines may be regulated by Congress and may not be dammed by State action. The National Industrial Recovery Act makes impossible any vertical obstructions in the stream of interstate commerce by widening its bed to the extent of flooding the country.

The act lays down as a legislative philosophy the principle that every business affects another, that intrastate business is so interrelated with interstate business with respect to the effect of one upon the other, as to make it impossible to distinguish between the two, and that by reason thereof Congress has the power to regulate all business.

It thus considers that the obstructions to the free flow of interstate commerce can only be removed by a general regulation of all business regardless of the character of the enterprise regulated, whether purely local or national in scope. It is submitted that the general effect of intrastate commerce upon interstate commerce may be so tenuous and incapable of fixation as to make it an unfit subject for legislation.

If the philosophy inherent in the National Industrial Recovery Act as here propounded is admitted, reference to precedent can be of little assistance, yet the same is not altogether to be disregarded. Thus, we find that commerce capable of regulation by Congress does not include the building of ships, the loaning of money, the dealing in bills of exchange, subscription of stock, the manufacture and erection of elevators in a building, the business of coal mining, rafting logs or the local sales of goods. The decisions of this Court have repeatedly held that the local sale of goods, the business of making or manufacturing goods is not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production subject to the Federal authority within the commerce clause of the Constitution.

Hammer v. *Dagenhart*, 247 U. S. 251;

United Mine Workers v. *American Coronado Coal Co.*, 259 U. S. 407;
Champlain Refining Co. v. *The Corporation Commission*, 286 U. S. 210;
Oliver Iron Mining Co. v. *Lord*, 262 U. S. 171;
Pipe Line Cases, 243 U. S. 548;
Board of Trade v. *Olsen*, 262 U. S. 1;
Hooper v. *California*, 155 U. S. 648.

To sustain the validity of the National Industrial Recovery Act necessitates the overthrow of all of the doctrines with respect to interstate commerce which have guided the conduct of the Government, the judiciary and of business since the inception of the Republic.

No better criterion for determining whether or not a specific act of Congress is within its power to regulate interstate commerce has been stated than is contained in *United States* v. *Ferger*, 260 U. S. 199, in which case the court says:

> "They cannot come within the regulatory power of Congress as such unless they are regarded by Congress from the evidence before it as directly interfering with interstate commerce so as to be an obstruction or burden thereon."

Close examination of the provisions of the National Industrial Recovery Act reveal not a single pronouncement that any particular trade practice, form of doing business or particular relationship is obstructing or burdening interstate commerce. The provisions of the statute are vague in the extreme. It is the declared policy of the act to "eliminate unfair competitive practices." Nowhere is there any statement in the act as to what is to be considered unfair. (It is submitted that within the doctrine of *United States* v. *Cohen Grocery*, 255 U. S. 81, the act may be held

unconstitutional as being a violation of due process of law upon the ground that no ascertainable standard of conduct is fixed.) No attempt has been made in the act to eliminate a particular obstruction to interstate commerce nor to aid a particular vehicle of interstate commerce.

N. I. R. A. concerns itself with the "entire sphere of mercantile activity."

In attempting to meet an economic distress in which the country finds itself, Congress has summarily placed all business under the aegis of the interstate commerce clause. That the legislative body of the United States has given lip service to the formula that it seeks only to regulate commerce should not blind the court to the realities of the situation that by the National Industrial Recovery Act the United States Government has taken over the management and control of every business of every nature and description, however local the same may be.

It is sincerely urged that the proponents and protagonists of the National Industrial Recovery Act will not and cannot for one moment urge that N. I. R. A. and the Codes promulgated pursuant thereto find their *raison d'etre* in the interstate commerce clause of the Constitution.

Citations by the proponents of the constitutionality of the National Industrial Recovery Act of the so-called various Landmark cases in the history of the due process clause from *Munn* v. *Illinois*, 94 U. S. 113; through *Nebbia* v. *New York*, 291 U. S. 502, is not in the least helpful. These cases are founded upon the admitted fundamental concept that the States of the Union may legislate within the police power. The concept we are faced with in the present emergency is whether Congress has an equal right. To state the proposition is to answer it. If Congress has an equal right to legislate with respect to police power, then the doctrine of State's rights of the separability of National and State legislation has been eradicated. This, it is submitted in the

light of precedent, finds no support in the past, and unless the Constitution is to be scrapped, is unthinkable in the future.

It is respectfully submitted that in the light of the authorities herein submitted, and with due respect to even a liberal interpretation of the Constitution, the powers claimed by the Congress to legislate in the fashion found in the National Industrial Recovery Act, are non-existent and that the legislation must fall.

The sponsors of the National Industrial Recovery Act and its supporters, seem to urge authority for the legislation in any one of three possible directions, in addition to the "Commerce Clause" heretofore commented on.

(a) The Preamble to the Constitution.

(b) The "general welfare" clause.

(c) The existence of emergency.

The Preamble can be summarily dismissed for this Court has explicitly held that it confers no power on Congress.

Jacobson v. *Mass.*, 197 U. S. 11.

This Court, in this now famous case, held:

> "• • • Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power

> can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom. 1 Story, Const., Sec. 462."

In 1 Story on Constitution, Section 462, this learned authority holds the rule to be as follows:

> "The preamble never can be resorted to, to enlarge the powers confided to the general government or any of its departments. It cannot confer any power *per se;* it can never amount, by implication, to an enlargement of any power expressly given."

Neither can the "general welfare" clause be considered as a constitutional support for the legislation attacked. The "general welfare" clause grants no power of the nature claimed for it, but is a mere specification of the purposes for which money may be appropriated. Such has been its uniform construction. It is limited for that distinct purpose and no more.

> Willoughby on Const. Law, 2nd Edition, 1921, page 61;
> 41 Federalist;
> *South Carolina* v. *United States,* 199 U. S. 437;
> *United States* v. *Boyer,* 85 Fed. 425 (Dist. Court, Mo.);
> *United States* v. *Realty Co.,* 163 U. S. 427.

The "welfare" clause has never been regarded as a substantive grant of power. "Any other view would be completely inconsistent with the doctrine that the Federal Government is one of enumerated powers" (Harvard Law Review, November 1933).

As a final basis for the Constitutional support of the

Act, the great public emergency is urged as a constitutional basis for the enactment of the legislation.

It is respectfully submitted that the public emergency declared in the Act as the basis for the Congressional action, is of no avail if the Constitution, *per se*, or by necessary implication, conferred no power to deal with it upon Congress.

By a long line of authoritative decisions, this Court has repeatedly declared that an emergency may not call into life a power which never was, but that emergency may afford a reason for the exercise of a granted living power already enjoyed.

Home Building & Loan Assn. v. *Blaisdell*, 290 U. S. 398;
Wilson v. *New*, 243 U. S. 332;
Block v. *Hirsh*, 256 U. S. 135;
Levy Leasing Co. v. *Siegel*, 258 U. S. 170;
Marcus Brown v. *Feldman*, 256 U. S. 170.

The Adamson Law, which the Court was considering in *Wilson* v. *New* (*supra*), was clearly an instance in which the sweeping powers of Congress over interstate carriers was awakened and exerted by Congress under an emergency; but in the Act here under discussion there is no awakening of sleeping powers, no exercise of a living but unused power under the provocation of troublous times. On the contrary, there is a bold, audacious, ruthless reaching out beyond constitutional limitations, across the State lines into the very daily life of every common calling and into the very heart of every individual and his individual business and trade, and an intrusion of government control and regulation, without even the semblance of a power, express or implied. It has been held and never departed from that emergencies do not permit those in power to suspend constitutional guarantees.

The first great case on this head is *Ex Parte Milligan* (1866), 71 U. S. (4 Wall.) 2, 120-121. In that case the Court said:

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."

In *Sterling v. Constantin*, 287 U. S. 378, the Supreme Court of the United States was considering an attempt by the Governor of Texas to regulate the use of complainants' property in the production of oil by Executive Order and with the aid of the militia. The Court, in deciding the case, cited the *Milligan* case and added: The proposition submitted to the Court was in substance that the military may suspend all civil rights in time of war. The Court said in the unanimous opinion:

> "The statement of this proposition shows its im-

portance; for, if true, republican government is a failure, and there is an end of liberty regulated by law."

In *United States* v. *Cohen Grocery Co.* (1921), 255 U. S. 81, 88, the same doctrine was sustained under the Lever Food Control Act.

While an emergency may affect the extent or manner in which an existing power may be exercised, *it does not confer or create new or additional powers or justify disregard of constitutional rights and limits.*

"* * * An emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson* v. *New*, 243 U. S. at 348.

In *Wilson* v. *New, supra,* the court well says on page 348:

"If acts, which, if done, would interrupt, if not destroy, interstate commerce, may be, by anticipation, legislatively prevented, by the same token, the power to regulate may be exercised to guard against cessation of interstate commerce threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite of the uninterrupted flow of interstate commerce."

It is thus to be seen that a specific act endangering movement in interstate commerce was legislated against. It cannot be claimed that anything tangible in the sense of specific cause and effect can be pointed to in N. I. R. A. as predicating interference with interstate commerce.

Those favoring the N. I. R. A. will undoubtedly raise the cry that if the same be held unconstitutional, the pro-

gress of the nation toward economic recovery will be inevitably delayed or destroyed. With that very thought, many of the leading economists and political theorists of the day take issue. Though the cure may be worse than the ill, in keeping with well-founded principles of constitutional interpretation, the judiciary will not inquire into whether or not the remedy sought to be invoked by a legislative body will accomplish its purposes if the power to invoke the remedy exists.

As was well said in *Nebbia* v. *New York*:

> "With the wisdom of the policy adopted, with the adequacy of practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal * * * though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

We need not concern ourselves with a discussion of whether the means may accomplish the end, since by the foregoing, power to accomplish the end by the means sought does not rest with Congress.

It is submitted that to sustain N. R. A. is to judicially legislate that Congress may enter the field of police power to the extent of directing local government and setting itself up against local and State autonomy and is to emasculate the Constitution in its entirety and to change our form of government.

Recognizing the contagious effect and harmful results of mob psychology, the founders of our republic and framers of the Constitution refused to enunciate any doctrine and the various States refused to subscribe to a doctrine that would abrogate the right of the individual States to take care of its own, except where the Union was threatened by a foreign foe. They therefore set up inalienable rights

which inhered to the people and to the States, which under no circumstances could be withdrawn from them, and which even the necessities of war could not eradicate (*Ex parte Milligan*, 4 Wall. 2).

It was in anticipation of a possible abortive attempt, on the part of what may be now referred to as the Continental Congress, to usurp the powers of the States, that the principle was enunciated that under no circumstances could the rights delegated to the States be in any way altered or impaired, except by the sanctions contained in the Constitution.

The sophistry of putting the Horseman of Despair and Depression on an equal legal footing with the Horseman of War cannot stand up under the scrutiny of the philosophy upon which this Government was founded. Despite four years of war, in which brother fought against brother, despite the fact that half of the nation was in the relationship of a conquered subject province of the other half, it nevertheless needed a constitutional amendment to blot out the stain of slavery, the cause of the war, and which the blood of the sons of the republic could not wash away. States' rights must be preserved.

Thus did our forefathers recognize the fundamental concept upon which the republic is predicated; that there are certain inalienable State rights which cannot be disregarded.

It was to meet popular hysteria and weakness that the Constitution was devised as a weapon for the use of the strong against the more numerous weak. No more noble or herbic duty devolves upon the judiciary of this country than to refuse to heed any panacea induced by public weakness which necessitates forgetting the Constitution which they have sworn to uphold and to obey.

As was said in *Adkins* v. *Children's Hospital*, 261 U. S., at 561:

"To sustain the individual freedom of action con-

templated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."

The words of the court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, at 416, must be heeded:

> **"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."**

The stabilizing limitations of the Federal Constitution are the firmest pillars of true Republican government and economic distress or so-called "emergency" is no legal justification for the subversion of this form of government. A zealous judiciary should uphold the Constitution particularly in the face of popular excitement and exhortation.

The Federal and State Constitutions are not things merely to be extolled in academic halls or be the subject of juvenile orations, but are vibrant and designed to safeguard not only life and liberty, but also property rights in times of stress and suffering when despairing and desperate majorities seek, by forbidden methods, the subversion of fundamental principles of government.

B. The delegation of legislative power to the President by Congress, renders the National Industrial Recovery Act unconstitutional.

The Constitution provides in Article 1, Section. 1, as follows:

> "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives."

By Article 1, Section 8 of the Constitution, Congress was granted the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes. It is further authorized to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

The general rule that the powers of government are divided among the three departments of government, and that the powers must be separately exercised by the respective departments which are invested with the powers by the Constitution, is elementary as stated in *Myers* v. *United States*, 270 U. S. 52, as follows:

> "• • • the Constitution was so framed as to vest in Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended and the Constitution should be expounded to blend them no more than is affirmatively required."

The rule appears in *Meriwether* v. *Garrett*, 102 U. S. 515, where the court said:

> "• • • all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration."

It is an ancient maxim, well established in the law, that once a power has been delegated it cannot be redelegated.

"Delegata protestas non potest delegari." It is fundamental that the power to legislate must remain wherever a sovereign people of a State have placed the legislative authority in the formulation of a Constitution for their guide. This has been so well founded as to become axiomatic and is a philosophy particularly applicable to the form of government of the United States.

In *Springer* v. *Philippine Islands*, 277 U. S. 189, the proposition is succinctly stated:

> "It may be stated then as a general rule inherent in the American Constitutional system, that unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judiciary power; the judiciary cannot exercise either executive or legislative power."

Panama Refining Co. et al. v. *Ryan* (135);
Amazon Petroleum Corp. v. *Ryan* (260); (United States Supreme Court, Nos. 135 and 260, January 7, 1935);
Field v. *Clark*, 143 U. S. 649;
Interstate Commerce Commission v. *Goodrich*, 224 U. S. 194;
United States v. *Grimaud*, 220 U. S. 506;
Buttfield v. *Stranahan*, 192 U. S. 470;
Wayman v. *Southard*, 10 Wheat. 1;
Oceanic Steam Nav. Co. v. *Stranahan*, 214 U. S. 320;
Passavant v. *United States*, 148 U. S. 214;
Union Bridge v. *United States*, 204 U. S. 364;
J. W. Hampton, Jr. v. *United States*, 276 U. S. 394;
Lynch v. *Tilden Co.*, 265 U. S. 315;

Maryland Casualty Co. v. *United States*, 251 U. S. 342;

Utah Power & Light v. *United States*, 243 U. S. 389;

United States v. *Shreveport Grain & El. Co.*, 287 U. S. 77.

Throughout the foregoing cases the distinction is drawn in the delegation of a discretion as to what the law shall be and the delegation of discretion in the administration of what Congress has declared the law shall be. Congress may authorize the latter, but it cannot do the former. Where the delegation of Administrative power ends and that of legislative power begins is a proposition which can only be decided as each case presents itself. As was well said by Mr. Justice Brandeis in his dissent in *Springer* v. *Philippine Islands*, 277 U. S. 189, at 210:

> "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."

In *Field* v. *Clark*, 143 U. S. 649, Congress, for the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, tea, coffee and hides, passed an act to the effect that the Act of 1890 permitting their free importation should be suspended as to any country which the President of the United States deemed imposed duties on our agricultural products reciprocally unequal. The constitutionality of the act was challenged as a delegation of legislative powers and the court held, at page 693:

> **"That Congress cannot delegate legislative power to the President, is a principle universally recognized as vital to the integrity and maintenance of a system of government ordained by**

the Constitution. The act of October 1st, 1890, in the particular under consideration, is not inconsistent with that principle. It does not in any real sense invest the President with the power of legislation. * * * Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. * * * **He had no discretion in the premises except in respect to the duration of the suspension so ordered, but that related only to the enforcement of the policy established by Congress.** * * * What the President was required to do was simply in execution of an Act of Congress. It was not the making of law. He was the mere agent of the law making department to ascertain and declare the event upon which its expressed will was to take effect.

The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

In *United States* v. *Grimaud*, 220 U. S. 506, Congress passed a general act establishing forest reservations and subjecting their use for grazing to regulations to be prescribed by the Secretary of Agriculture in his discretion, Congress providing the punishment for violation. The court said:

"It must be admitted that is difficult to define the line which separates legislative power to make laws from administrative authority to make regulations."

At page 522:

"The Secretary of Agriculture could not make rules and regulations for any and every purpose.

Williamson v. *U. S.*, 207 U. S. 462. As to those here involved they all relate to matters **clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. Congress legislated on the subject as far as was reasonably practicable** and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."

In *United States* v. *Shreveport Grain & El. Co.*, 287 U. S. 77, the court says:

> "That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will and after fixing a *primary standard*, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations. The effect of the provision assailed is to define an offense, but with directions to those charged with the administration of the act to make *supplementary* rules and regulations allowing reasonable variations, tolerances and exemptions which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe."

Examination of the foregoing cases with respect to distinguishing between the delegation of legislative and administrative powers reveals the following guides: there must be no discretion in what the law shall be; the extent of law must have been clearly indicated in so far as practicable by Congress, and the most that the delegated authority may do is to supplement the rules laid down by Congress. While the difficulty in labelling twilight either day or night is judicially recognized, the distinction between day and night is such as to admit of no doubt. In all of the foregoing cases Congress enunciated and specifically defined certain laws, in the execution of which varying degrees of discretion were necessary, but throughout all of the cases one funda-

mental fact is common to all. The scope and field embraced by the law was specifically defined by Congress. The incidental manner of its execution, the determination of facts as to what will constitute violation, was the most that was delegated.

Turning then to N. I. R. A. we find the following: that in Section 1 thereof Congress has declared it to be the legislative policy, by reason of a national emergency, to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish unemployment and disorganization of industry by inducing united action of labor and management, promoting the organization of industry for the purpose of co-operative action among trade groups, to eliminate unfair competitive trade practices, promote the fullest possible utilization of the present productive capacity of industries, avoid undue restriction of production, increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor and otherwise to rehabilitate industry and conserve natural resources. Section 10 of the Act authorizes the President to prescribe such rules and regulations as may be necessary to carry out the purposes of this title. Without examining what is contained in the Act between Sections 1 and 10, in keeping with the rules laid down in the foregoing cases, and with the memory of the form of most statutes, a presumption would be reasonable which concluded that Sections 2 to 9, inclusive, contained Congressional *legislation,* Congressional *definition,* touching on unfair competitive practices, promotion of co-operative action among trade groups, the restriction of production, improvement of the standards of labor, and the other purposes and policies laid down in Section 1.

What do we actually find? Section 2 grants to the President the power to establish agencies to carry out the policies set forth in Section 1, including the appointment without

regard to the provisions of the civil service laws of such officers and employees as he may find necessary.

Section 3 contains the delegation to the President of the power to make laws rather than to fill in such details as may be necessary in their execution. Section 3 authorizes the President of the United States to approve a Code of Fair Competition where in his **sole discretion** he finds that they contain no inequitable restrictions on admission to membership therein and are truly representative of the trade codified, and do not permit monopolies or monopolistic practices. **In the sole discretion of the President of the United States as a prerequisite to his approval he may impose conditions upon the promulgation of codes as he deems in furtherance of the public interest** and may provide such exceptions to and exemptions from the provisions of a code as in his sole discretion he deems necessary. **Upon approval by the President of the United States alone, such code becomes the law for the guidance of the members of an industry and must be enforced by all the authority which vests in the United States Government.** Upon his own motion, where no code has theretofore been approved, the President of the United States, after such public notice and hearing as he in his sole discretion shall specify, may promulgate a code for a particular industry.

By Section 4 of the Act, when the President of the United States, *in his sole discretion,* finds that activities contrary to the policy of this title are being practiced in any trade or industry, he may, on such notice as he deems necessary, issue an edict that after a certain date no one may engage in a business affecting interstate commerce unless he first shall have obtained a license from the President of the United States.

There is not contained in the foregoing act, with the possible exception of such provisions as may refer to the

petroleum industry, a single specific, well-defined legislative enactment. It is submitted in all sincerity that Congress might just as well have said:

> "The country is faced with an emergency; we do not know how to meet it; Mr. President make your own laws."

In keeping with the powers vested in him by this act the President of the United States has enacted laws covering every field of endeavor imaginable. Whether or not a State or Federal government may pass laws with respect to hours of labor, wages and conditions of employment the same have been the subject of judicial dispute since the founding of the Constitution. The right to so *legislate* has at times been denied, and at times affirmed, depending upon the facts of each case.

Sweeping aside all these fundamental concepts, the President of the United States has been given the power and authority to fix hours, wages and conditions of employment in his sole discretion and as he sees fit. **This is no "filling in of details." This is an establishment of laws.** The right of Congress to legislate with respect to child labor has been denied and at the present time State conventions and State legislatures throughout the country are acting upon a constitutional amendment with respect to child labor. Yet the President of the United States, within the authority conferred upon him by this act, has outlawed child labor. Is this "filling in details"?

The Supreme Court of the United States has forbidden Congress the right to legislate with respect to the business of the butcher, the baker and the grocer. Congress cannot evade this restraint upon its power by delegating its exercise to the President of the United States. Assuming that Congress had the right to legislate into existence the laws which are incorporated in the various codes which have been

promulgated, that right could not be transferred to the President of the United States.

Relying upon the foregoing proposition of law, we find several lower court decisions construing the National Industrial Recovery Act as an unconstitutional delegation by Congress of its legislative functions to the President.

United States v. *Suburban Motor Service Co.*, 7 Fed. (Supp.) 798;
Hart Coal Co. v. *Sparks*, 7 Fed. (Supp.) 16;
United States v. *Eason Oil Co.*, 8 Fed. (Supp.) 365;
Darweger v. *Staats* (N. Y. Supreme Court), 152 Misc. 522.

In *U. S. of America* v. *Suburban Motor Service Corp. et al* (*supra*), the Court said:

> "Did Congress, in enacting the National Industrial Recovery Act, delegate its legislative power in violation of the constitution of the United States?
>
> "The Supreme Court of the United States has said 'that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution' (*Field* v. *Clark*, 149 U. S. 649, 692), but that court has been liberal in the application of the rule. (See *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294, 305.) The question in each case seems to be whether the legislative branch of the government has, with sufficient definiteness, announced the legislative policy. If the Congress has, in the National Industrial Recovery Act, announced a legislative policy, it is in the following language, found in Title I, Section 1:
>
> 'It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to

diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of co-operative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.'

"It seems to the court that Congress in this act has been so indefinite in its pronouncement of the legislative policy that the principle of constitutional law which we are considering has ceased to have any effect in National affairs, if the act is valid. If the Congress may constitutionally delegate power as it has delegated it in the National Industrial Recovery Act, it is difficult to see why the Congress may not, in an act, declare that its policy is to provide for the general welfare of all the people and that, accordingly, the President may promulgate such rules and regulations, having the effect of law, as will in his discretion best provide for the general welfare of all the people, and, *when that happens constitutionally, constitutional government, as we have known it, will cease to exist.*" (Italics ours.)

It is respectfully submitted, that the legislative purposes, as expressed in the Act, have been declared in the most general terms, and that either the President under the Act or the persons engaged in the industry, have been given practically unrestrained, uncontrolled and unreviewable

discretionary power to prescribe rules, regulations and penal enactments for industry.

The delegation of such unqualified powers to an executive and further to the people, is in effect, a delegation of the power both to announce a legislative policy rather than to enforce a policy already announced, and to enact exclusive of legislative power, or beyond the scope of legislative policy, enactments of law.

> "Certainly in no previous statute has there been such a broad grant of power with so indefinite a guide given to a Congressional enforcement agency." (Harvard Law Review—November 1933.)

An analysis of the Act and the Code of Fair Competition involved in the case at bar, reveals: Startling delegation of legislative power by Congress to the President, and more startling, the re-delegation of such legislative power by the executive to the persons engaged in an industry, the people.

In short, the President is given such wide, unlimited and uncontrolled power that Congress has abdicated practically all of its lawmaking functions to the President, or to such subordinates to whom he may delegate such powers, and thus in one swoop the President is made czar or dictator of the country and of all industry and business within the nation. The codes have no value unless approved by the President, but when approved it is contemplated that they shall have the force "of law, not only in respect to those who have consented and agreed to be bound thereby, but also in respect to those who have not consented" thereto. The President is also given the power to prescribe compulsory codes in any trade or industry or subdivision upon his own motion or upon the mere filing of a complaint "that abuses inimical to the public interest and contrary to the policy herein declared are prevalent" therein.

Likewise, the President may at any time change any code. In short, the Act attempts to give the President absolute, arbitrary and uncontrolled legislative power to prescribe the terms and conditions upon which persons engaged in every trade and industry may conduct their business. The dictate of the President is final, and any violation of a code approved or prescribed by him, whether the violator has agreed to be bound thereby or not, is made a misdemeanor punishable by a fine of $500. per day for each violation.

It is clear that the statute makes the wholesale delegation of legislative power to the President if the delegated power to approve, or to prescribe and approve, codes of fair competition includes more than power to prescribe standards of fair competition within the field of "fair competition", "unfair competition", "unfair methods of competition", and "unfair competitive practices" as such field has been defined by prior judicial decisions and the ordinary and established meaning of those terms. Otherwise, it would include power to prescribe any regulations or laws which Congress itself could prescribe in order to accomplish the general objects and purposes of the statute as set forth in Section 1 of the statute, subject only to the limitation in Section 3 with relation to small enterprises and monopolies and monopolistic practices, and the positive requirements concerning labor in Section 3 (e) and the limitations in Section 5 relating to manual labor and farm products.

Excepting these limitations and requirements, no standard is defined and no principle declared controlling the administration of the Act. The Act might just as well have authorized the formulation and approval of codes for the welfare of industry and labor, or for the public welfare, and with the requirements and limitations referred to, would have been no less certain or definite than the Act in its present language.

Manifestly, this leaves the field within which authority is to be exercised largely, if not principally, without a statutory standard or principle of control. To illustrate the importance of this defect, reference may be made to one of the many perplexing problems that have confronted the administrators of the codes, *i. e.*, price fixing. The legislative policy with relation to price fixing is one of the most important subjects to be considered when codes are contemplated. Is price fixing to be permitted? If so, is it to be confined to a requirement that articles shall not be sold below cost? If that be the case, how are costs to be determined? Are they to be measured by productive and operative costs of economical units, or are they to be established at a figure sufficiently high to permit of the operation of units less happily situated? If prices are to be fixed above cost, what amount of profit shall be permitted?

These questions are but one phase of the problems that arise in the administering of the codes, and yet they involve legislative policies of paramount importance, certainly equal to, if not exceeding in vital consequence the subjects with reference to which the express limitations and requirements are prescribed in the Act.

There is not a word, however, in the Act that furnishes any standard or principle to guide or control the executive in determining these policies.

One of the major and most momentous objects of legislative action delegated to the President under this Act is that of determining what portion of income shall be allocated to labor and what portion shall be allocated to capital. Under the terms of the Act the power is absolutely invested in the President to make such orders in connection with the adoption of codes, whether voluntary or compulsory, as will determine this allocation.

This is one of the most important problems confronting the nation today. Several million American citizens receive income from invested capital. They may be in a

minority, but it may well be doubted whether they, together with those whom they employ in personal service and those who receive employment directly and indirectly as a result of their personal expenditures, do not constitute a majority of the people in receipt of income in the United States.

Is the economic welfare of the nation to be served by diminishing the purchasing power of these classes and increasing the purchasing power of those who labor for corporate enterprises? What balance is to be struck between those who live on the income of capital, either directly or indirectly, and those whose income is entirely dependent upon labor? This is without a doubt the most perplexing and difficult problem before the American people at this time.

Under this Act, authority is delegated to the President to determine that important and far-reaching problem. If the problem is to be dealt with by legislation, certainly it is one of the most important and vital subjects for legislative action that the nation has ever confronted. If Congress can delegate to the President the unlimited and uncontrolled discretion to determine that problem, as it has attempted to do, there is no subject of legislation and no form of legislative action that cannot be delegated. If this type of legislation can be sustained, then the way has been prepared for Congress to avoid all of its legislative responsibilities by enacting laws giving the President a general power of attorney to solve any legislative problem.

The argument of the appellant is tersely expounded in the decision of the New York Supreme Court (*Darweger* v. *Chas. B. Staats*, 153 Misc. 522):

> "The legislative power of the Congress has been abdicated more fully than in any previous enactments. Penal responsibility has been imposed for violation of the directions and regulations of ad-

ministrative authority to an extent never before imposed. If such abdication of legislative power is within the authority of the Congress, then a coordinate branch of the Federal Government created by the constitution may voluntarily destroy itself and disrupt the American system of government. If such grant was merely to create administrative rules and regulations to effect and carry out the provisions and declared purposes of the enactments, many authorities sustain such provisions. *If, however, a grant not merely to create administrative rules and regulations, but to enact and adopt legislation carrying criminal penalties, is constitutional, it must necessarily follow the power may logically be carried to the adoption of an act by the Congress to the effect that the President be empowered to adopt such rules and regulations as he may deem in the interest of the general welfare.* The destruction will then be complete. Representative government will have ceased to exist. Benevolent despotism will be substituted in its place." (Italics ours.)

It will no doubt be contended before this Court that the execution of the policy enumerated by Congress in Title 1 of Industrial Recovery Act is purely administrative, and the mere "filling in of details". With that contention, Constitutional authorities and the decided cases, disagree. Is the enactment of penal statutes, with drastic penalties for their violation a mere "filling in of details"? Is the regulation, through all the ramifications of industry, from the insignificant bootblack to the powerful industrial magnate, a mere "filling in of details"? The question begets the answer. We respectfully submit that the argument urged by the proponents of the Act, that the Executive merely "fills in details" is a cloak for the exercise of legislative functions.

It will undoubtedly be further urged on this Court

that the power delegated by the National Industrial Recovery Act to the Executive, is merely a power to determine the facts upon which the statute is to become operative or inoperative, or that the power delegated is merely that of finding facts and prescribing details for the administration of regulations under general standards and policies fixed by Congress.

These arguments, in the light of the authorities, are fallible, for in none of the decided cases was there ever a wholesale delegation of legislative power as is apparent from a reading of the present Act.

In all the cases cited by this Court in support of its decision in the case of *Amazon Petroleum Corp.* v. *Ryan* (*supra*), where Congressional delegation was involved, the holdings were without contradiction that Congress, in such particular incidents, had declared *within intelligible bounds and limitations* the functions of the Administrator. In all the cases, Congress had fixed a "primary standard", and granted the administrative power to administrative officers to fill in the details *within defined limits.*

United States v. *Grimaud,* 220 U. S. 506;
Hampton v. *United States,* 276 U. S. 394;
Field v. *Clark,* 143 U. S. 649;
The Brig Aurora, 7 Cranch. 383;
Union Bridge Co. v. *United States,* 204 U. S. 364;
Monongahela Bridge Co. v. *United States,* 216 U. S. 177;
United States v. *Chemical Foundation,* 272 U. S. 1.

In every case wherein the question was raised, this Court "has recognized that there are limits of delegation which there is no constitutional authority to transcend" (*Amazon Petroleum Corp.* v. *Ryan, supra*).

If the Act were held valid, "it would be idle to pretend that anything would be left of limitations upon the power of Congress to delegate its lawmaking functions" (*Amazon Petroleum Corp.* v. *Ryan, supra*):

> "The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law making function, the Congress would at will, *and as to such subjects as it chooses,* transfer that function to the President, or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government" (*Amazon Petroleum Corp* v. *Ryan, supra*). (Italics ours.)

The National Industrial Recovery Act evidences an unmistakable and indefensible delegation of legislative functions by Congress to the President without any intelligible standard or principle, without any bounds or limitations, and as such, must fall prey to the ax of unconstitutionality.

In the light of the foregoing considerations, we respectfully submit that the National Industrial Recovery Act and the Code of Fair Competition for the Motor Vehicle Retailing Trade approved pursuant thereto, must fall, for no warrant of authority exists in Congress to regulate the subject matter embraced therein, and in any event, the approval of the Code, by the President is a nullity, for with all due consideration to even a liberal construction of the Constitution, he has usurped a legislative function unconstitutionally delegated unto him by Congress.

POINT II.

The approval of the code of fair competition for the motor vehicle retailing trade by the President, more particularly Article IV, subdivisions A and B thereof, was beyond the scope of the provisions of the National Industrial Recovery Act.

The National Industrial Recovery Act provides, in Section 3 (a) that the President may approve, and in Section 3 (d) that the President may prescribe and approve, a *"Code of Fair Competition"* for a trade or industry or subdivision thereof. Section 3 (b) provides that: "After the President shall have approved any such code, the provisions of such code shall be the *standards of fair competition* for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an *unfair method of competition* in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended." Section 3 (c) vests the several district courts "with jurisdiction to prevent and restrain violations of any *code of fair* competition approved under this title", and vests the duty of instituting proceedings in equity to prevent and restrain such violations in the several United States District Courts under the direction of the Attorney General. Section 3 (f) provides that when a *code of fair competition* has been approved or prescribed by the President "any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor" and punishable by a fine of $500 for each day the violation continues.

It is the contention of the appellant herein that the

provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, Subdivision A (with the exception of paragraphs "5" and "6" thereof), and Subdivision B (with the exception of paragraph "8" thereof), are not authorized by the National Industrial Recovery Act, as properly construed, and that the President exceeded his proper functions in approving the same.

There is no definition of the term "fair competition" as used in the statute. The statute provides that any code approved or prescribed under it (1) shall not be designed to promote monopolies or (2) to eliminate or oppress small enterprises, and (3) will not operate to discriminate against them, and (4) shall not permit monopolies or *monopolistic practices*, and (5) shall tend to effectuate the policy of the statute, which is declared in most general terms.

Since Congress did not include a definition of the term "fair competition" in the statute, it must be assumed that it used the term in its legal significance by reason of its previous use in trade and in law. If Congress had intended to provide codes of broader scope, it would have used terms to cover the subject properly. Without much waste of words, it could have set forth the scope of the term "fair competition" if it was intended to have more than its ordinary and well established meaning as set forth in previous statutes and decisions.

In construing the statute as a whole the terms "fair competition" and "unfair method of competition" should be given their ordinary meaning in the light of the common law and the decisions under the Federal Trade Commission Act which is referred to in the statute. *Sears Roebuck & Co.* v. *Federal Trade Commission* (C. C. A.), 285 Fed. 307; *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441, 453; *Federal Trade Commission* v. *Sinclair Refining*

Co., 261 U. S. 463; *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304.

It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decisions, is presumed to be used in that sense by the legislative body.

Kepner v. *United States*, 195 U. S. 100, 124, 49 L. Ed. 114, 122;
The Abbotsford v. *Johnson*, 98 U. S. 440, 441, 444, 25 L. Ed. 168, 169, 170.

Also, unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them.

De Ganay v. *Lederer*, 250 U. S. 376, 381, 63 L. Ed. 1042, 1044;
Miller v. *Robertson*, 266 U. S. 243, 250, 69 L. Ed. 265, 272.

The ordinary meaning and the well-settled legal meaning of the term "fair competition" are the same, so either rule of construction may be applied.

In its use of terms, the statute resembles the Federal Trade Commission Act, which provides that "unfair methods of competition" in interstate commerce are declared unlawful. The Federal Trade Commission is empowered and directed to prevent the use of "unfair methods of competition" in interstate commerce.

The National Industrial Recovery Act, Section 3 (b) provides that violations of the "standards of fair competition" fixed by the "codes of fair competition" shall be deemed an "unfair method of competion" within the meaning of the Federal Trade Commission Act. It is clear that the two statutes refer to the same things.

The term "unfair method of competition" has uniformly

been construed to include only practices opposed to good morals because characterized by deception, bad faith, fraud or as against public policy because of their dangerous tendencies unduly to hinder competition or create monopoly.

The term "unfair method of competition" has been held by this court to have a legal significance, just as the terms "undue influence", "reasonable rates", etc., have legal significance. The term is referred to in *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427, 64 L. Ed. 993, 996, as follows:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practised by honorable opponents in trade."

See also:

Federal Trade Commission v. *Raymond Bros. Clark Co.,* 263 U. S. 565, 572, 68 L. Ed. 448, 455;

Federal Trade Commission v. *Beech-Nut Co.,* 257 U. S. 441, 453, 66 L. Ed. 307, 313.

In *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 648, 75 L. Ed. 1324, 1329, the court referred to the term "unfair method of competition" as used in the statute, as follows:

> "The bill which was the foundation of the act,

as it first passed the Senate, declared 'unfair competition' to be unlawful. Debate apparently convinced the sponsors of the legislation that these words, which had a *well-settled meaning at common law, were too narrow.* When the bill came from conference between the two Houses, these words had been eliminated and the words 'unfair methods of competition' substituted. Undoubtedly, the substituted phrase has a broader meaning but how much broader has not been determined. It belongs to that class of phrases which does not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.' *Davidson* v. *New Orleans,* 96 U. S. 97, 104, 24 L. Ed. 616, 619. The question is one for the final determination of the courts and not of the commission." (Italics the writer's.)

In *Curtis Pub. Co.* v. *Federal Trade Commission,* 270 Fed. 881, 908 (C. C. A., 3d), affirmed with an opinion in 260 U. S. 568, 67 L. Ed. 408, the Publishing Company's contract with its local agents provided that they would not sell at wholesale the magazines of any other publisher without consent. In holding that such a contract was not an unfair method of competition, the Circuit Court of Appeals said of the Federal Trade Commission Act:

"* * * What is unfair competition in business? Now, while Congress has enacted, as we have seen, 'that unfair methods of competition in commerce are declared unlawful,' it has not defined unfair competition, or specified what shall constitute unfair competition. From this absence of definition, it is reasonable to infer that it was in the mind of Congress that, as unfair competition had long been a *subject of judicial scrutiny, determination,* and was involved in remedial suits at law for damages and of injunctive suits in equity, to prevent continuance,

the definition and ascertainment of what constituted unfair competition was a legal question which the law could determine. Indeed, in nature of things, it was impossible to describe or define in advance just what constituted unfair competition, and in the final analysis it became a question of law, after the facts were ascertained, whether such facts constitute unfair competition in business, for the test of fairness, as of fraud, is the application by the law of moral standards to the actions of men."

* * * * * * * *

"* * * Manifestly, Congress did not mean to confer upon the Trade Commission the power to grant injunctions in cases of business competition, where courts would not be justified in granting injunctions." (Italics the writer's.)

In *Kinney-Rome Co.* v. *Federal Trade Commission*, 275 Fed. 665, 666, 668 (C. C. A., 7th), the court was reviewing an order of the Commission regarding a practice of giving premiums to salesmen of retailers. The court said:

"While the exact words 'unfair methods of competition' have not been frequently, if at all, used in the decisions, yet 'unfair competition' and 'unfair trade' have been repeatedly the subject of consideration and discussion by federal and state courts, and several times in this circuit. (There follows a review of cases.)

"We conclude, from the discussion of the term 'unfair competition' by the courts, and we are of opinion, that there must be some *fraud* in trade that injures a competitor, or *lessens* competition, before it can be said that there has been used an 'unfair method of competition.'"

In *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475, 67 L. Ed. 746, 754, the court reviewed a judgment of the Circuit Court of Appeals reversing an

order of the Federal Trade Commission against a refiner furnishing pumps to gasoline retailers. The court held the practice was not an unfair method of competition, saying:

> "The powers of the commission are limited by the statutes. *It has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to prescribe arbitrary standards for those engaged in the conflict for advantage called 'competition'.* The great purpose of both statutes was to advance the public interest by *securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs.*" (Italics the writer's.)

This court has followed these decisions in many cases which have come before it. In the recent cases of *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, and *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, the same general principles are set forth as in the preceding decisions of this court and applied to new instances of "unfair competition". In the first case goods were mislabeled so as to masquerade for something other than that which they really were, so as to deceive the public, and injure competitors not willing to do business on such an immoral or dishonest basis. In the second the unfair trade practices involved and promoted gambling by exploitation of consumers, principally children.

The following extract from Hearings before Senate Committee on Finances, on the National Industrial Recovery Act, May 22-June 1st, 1933, page 285, is instructive:

> "Mr. Emery. What can be put into that code, Senator, is highly indefinite.

Senator Reed. It may include such things as the selling price, may it not?

Mr. Emery. *I am very doubtful of that, because it says the President may include the codes, or code of fair competition. I do not know what he could put in there with the expectation of approving price control or control of production, because the Supreme Court in passing upon a case before the Federal Trade Commission said that that involves acts which are against good morals or involves fraud or deceit or tends toward monopoly, or acts which are oppressive or restrain trade.*

Senator Reed. It is our duty to protect the public just as much as it is to encourage industrial recovery.

Mr. Emery. Yes, sir.

Senator Reed. It seems to me that clearly under the law, as it stands today, for competitors to get together and make a pool fixing selling prices and eliminate competition is a crime under our present law.

Mr. Emery. It certainly is." (Italics the writer's.)

The term "unfair competition" was used by the courts in referring to trade offenses long before the term was ever used in a statute. Thus, in *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict,* 198 U. S. 118, 140, 49 L. Ed. 972, 986, in a suit to enjoin the use by another of a trade name, the court said:

"* * * the essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another; and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

In *Goodyear's etc. Co.* v. *Goodyear Rubber Co.,* 128

U. S. 598, 604, 32 L. Ed. 535, 537, in a similar suit to restrain the using of a similar name, the court said:

> "The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture, to the injury of the plaintiff."

The remedy of injunction, as applied to matters of "unfair competition", is discussed at length in Pomeroy's Equity Jurisprudence, 4th Ed., Sections 2005-2011. The basis for the remedy against unfair competition is that the guilty person is taking the business away from competitors by wrongful and unfair methods of doing business, involving oppression, fraud, or immorality of some kind. The most common basis for the remedy is a use of names or labels similar to those used by a competitor for the purpose of taking advantage of the competitor's good will or advertising.

There have been no cases which our search has disclosed where it has ever been even suggested that fair competition requires or contemplates the fixing of prices, the control of prices, or any of the provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade. As a matter of fact, such activities as therein expressed, are ordinarily not opposed to good morals or characterized by deception, bad faith, fraud or oppression.

The purchase of a trade-in automobile or the sale of a new automobile is an innocent, lawful, local business. To place limitations upon such a business in the respects set forth in Article IV of the Code fetters free and fair competition as commonly and judicially understood and construed and practiced by honorable opponents in trade. The

provisions of Article IV attacked, operate by mere fiat to characterize the fair and honest activity of the local automobile merchant as unfair and dishonest. More than this, it is a perversion of the term "unfair competition", and is unfair and unjust to honest endeavor and to the merchant who has established a legitimate business and an established market for his automobiles. The provisions deprive the local automobile dealer of the right to freely compete and engage in his established market, and grants unto the honest, efficient merchant's competitors of less efficiency, such gainful advantage. It reduces the efficient and the inefficient to a common level by arbitrary and capricious means not related to fair competition and destroys the results thereof. (*Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463.)

When we set up legal restrictions such as are contained in Article IV of the Code, we remove the economic penalties of direct loss for engaging in ignorant and stupid price competition. We place a premium upon merchandising stupidity and guard with a halo, the inefficient retailer from the normal and incidental hazards of competition. There is no quicker road to business failure than to ignore the ordinary play competition affords and seek to burden the consumer with artificial restraint upon his purchasing power.

We would be perversely blind not to recognize that violation of these provisions (Article IV) has been widespread and that no effective machinery has been or could be possibly set up by the Government or anybody to detect and punish the innumerable violators of the provisions of this Code. It is impossible without an enormous and costly organization to police thousands upon thousands of automobile retailers throughout the United States. This is admitted even by the most ardent of enforcement agencies.

Witness the effect of the price fixing provisions of the former Code of Fair Competition for the Cleaning and

Dyeing trade upon that industry. It was so widely and flagrantly violated, that the President, for fear of complete destruction of the industry, rescinded the price fixing provisions of the latter Code and left remaining therein the salient provisions of the Industrial Recovery Act, to wit, maximum hours and minimum wages.

When a little tailor in the State of New Jersey was thrust into jail for pressing a pair of trousers at less than the established Code price, the hue and cry that ensued throughout the Nation, was deafening. He was immediately released from the penalties of such a nefarious crime.

The provisions of Article IV of the Motor Vehicle Retailing Code can no more be enforced than was Prohibition. Nor can trade policing be substituted for impartial but impossible government enforcement. Merchants should not be put to spy upon each other for such system breeds ill will, malcontent, animosity and favoritism. Local Code authorities cannot, by the nature of their composition, be impartial, or be permitted to determine who should or should not be prosecuted for violation.

The Record in the case at bar, presents a distasteful picture of oppression, hypocrisy, evasion, and above all, that contempt for law which inevitably follows widespread, impossible law enforcement. When so-called Code authorities resort to the use of dictaphones for the purpose of obtaining evidence against an alleged violator of the provisions of Article IV of its Code, we submit that it is indeed stooping to the lowest phase of reprehensible so-called enforcement.

If these price fixing provisions and trade regulations could or should ever be enforced, we would have to build many more penal institutions to house the Code violators.

Agreement with the contention urged in this point is found in several decisions of lower Courts which were called upon in the cases cited, to pass upon the validity of price fixing powers or price control by the Congress.

See:

United States v. *Robt. Sutherland* (District Court, Western Dist. of Missouri, Western Division, in Equity No. 2552, Dec. 27, 1934) (not yet officially reported, Prentice-Hall Trade & Industry Service, p. 8552);

United States v. *Gooch* (*No. 524*), 8 Fed. Sup. 1021 (Adv. Sheets, Jan. 28, 1935);

United States v. *McGraw-Curran Lumber Co. et al.* (*No. 523*), 8 Fed. Sup. 1021 (Adv. Sheets, Jan. 28, 1935);

Wilentz v. *Crown Laundry Service*, 172 Atl. Rep. 331;

State of Ohio v. *Gulatt* (Court of Common Pleas. Hamilton County, Ohio, May 5, 1934, Prentice-Hall Trade & Industry Service, p. 8183);

Mississippi Valley Hardware Co. v. *McClanahan*, 8 Fed. Sup. 388 (Adv. Sheets, Dec. 3, 1934).

In the first case above cited (*United States* v. *Gooch*), the District Court stated:

> "There is nothing dishonest or unfair in the mere underselling of a competitor in open market. A lower price than others are willing to accept for the same article in and of itself does not necessarily involve unfair competition on the part of the seller. *It has never been so considered by the courts or declared by Congress.* To do so would tend to check efficiency in production and distribution. There must in addition be some ingredient harmful in nature and wrong in principle, such as price cutting for the purpose of destroying a competitor and creating a monopoly, contrary to public policy, but nothing of that kind is presented here in the pleadings or proof upon the application for a preliminary injunction." (Italics the writer's.)

In the case of *United States* v. *Sutherland* (*supra*), the District Court held:

"PRICE FIXING NOT EXPRESSLY AUTHORIZED BY CONGRESS.

1. The statute certainly does not expressly authorize the President or any other to fix retail lumber or any prices. It does authorize the President to approve for certain industries codes of fair competition and gives to the approved codes the force of law. If a price fixing code is not a code of fair competition then it is not one which the statute authorizes.

To call a set of regulations a code of fair competition does not make it one. Any given set of regulations, if challenged, or any regulation in the set, if challenged, must be tested to determine whether it has any possible relationship to the subject of fair competition.

The statute does not define the phrase 'fair competition' but that phrase and the words in it are common and of well understood significance. 'Fair competition' is 'open', 'equitable', 'just' competition. It is a competition which is fair as between competitors and as between any of them and his customers. But 'fair' competition must still be 'competition'. The adjective does not destroy the noun. Competition is 'the effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms'. Webster's New International Dictionary. *To prohibit one of two who are dealing in the same commodity to offer that commodity at a lower price than the other offers it is not to effect fair competition but is to destroy competition in its very essence.*

Fair competition must be the opposite of unfair competition. 'Unfair competition' many times has been judicially defined. 'The essence of the wrong

in unfair competition consists in the sale of goods of one manufacturer or vendor for that of another.' *Howe Scale Co.* v. *Wyckoff*, 198 U. S. 118, 140; *Hanover Co.* v. *Metcalf*, 240 U. S. 403, 412. In the multitude of cases, federal and state, which have dealt with the subject of unfair competition, it is doubtful if there can be found one in which the underselling by one of another, without any fraud or misrepresentation, was held to be unfair competition. If so selling is not unfair competition it is fair competition. *When Congress used that phrase the presumption is it used it as the phrase generally is understood.*

PRICES FIXED HERE UNAUTHORIZED BY STATUTE.

2. But whether it can be said that Congress did not intend to authorize price fixing to any extent whatever when expressly it only authorized approval of codes of fair competition it certainly must be said that it did not authorize arbitrary price fixing. Any price fixing is inconsistent with the historic conception of competition but if that consideration be laid aside and if it be said that one who sells his own goods in competition with other vendors of like goods may be unfair to them when he undersells them that conclusion must be reached through the application of some rational standard of fairness and not by the *ipse dixit* of an official. And the standard must be one that can be expressed in formula. If it is not one that can be so objectively perceived then in no true sense is it a usable standard; at most it is no more than the whim of an individual.

In the statute enacted by Congress no standard for determining what is fair competition is provided. The standards already established in the law and any other rational standard were, therefore, available for use." (Italics the writer's.)

In *Mississippi Valley* v. *McClanahan* (*supra*), the District Court held:

> "In this case, complainants ask for injunctive relief against the District Attorney to prevent arrest, indictment, and prosecution for violating the so-called 'price-fixing' or 'price protection clause' of the Hardwood Lumber Code, organized under the National Recovery Act.
>
> There is no mention in the Act itself of price-fixing or price protection. The act itself authorizes the various industries to compile codes of 'fair competition' which become law on the approval of the National Recovery Director.
>
> The words 'fair competition' by a long series of judicial decisions have been fully defined. These definitions do not include price fixing. Competition has these elements: 1st—Price; 2nd—Quality and 3rd—Service. Price regulation is the antithesis of competition, fair or otherwise.
>
> From time to time, as witness the Lever Act, legislative bodies have fixed maximum prices with doubtful success. No legislative body has ever fixed a minimum price to my knowledge. To hold that Congress in the National Recovery Act has fixed a minimum price by implication is to carry judicial construction too far.
>
> The court concedes the power of Congress to fix prices, under certain circumstances, on goods moving in interstate commerce. *There is nothing in the N. R. A. to show that such was the intention of Congress. The very term, 'fair competition', negatives any such construction.*
>
> It is an intolerable situation for citizens to hold salable property which they dare not fix a price on for sale purposes, without fear of criminal prosecution. Complainants are entitled to the injunctive relief sought against the District Attorney, limited, of course, strictly to the price fixing or price protec-

tion feature of the Hardwood. Code." (Italics the writer's.)

In asserting that Codes under the New Jersey Recovery Act (comparatively similar to the National Industrial Recovery Act) granted no right to fix prices the Court of Chancery in *Wilentz* v. *Crown Laundry Service* (*supra*) said:

> *"But, even granting to the Legislature the utmost power which has been claimed for it, it must still be conceded that the exercise of such power requires explicit unambiguous language. It will not be presumed in the absence of such language that the Legislature intended to grant to the Governor or to any subordinate body, such as the code authority, power to fix minimum prices below which businessmen of New Jersey cannot lawfully sell their goods or services.* I turn again to chapter 372. 'Fair competition', the only authorized subject of the code, may be taken as the opposite of 'unfair competition', a term which has long been employed by the courts. It has generally been understood to mean a form of competition involving deception of the public as by the imitation of trade-names, labels, etc. The United States Supreme Court, referring to the Federal Trade Commission Act (15 U. S. C. A., Sec. 41 *et seq.*) has said: 'The words "unfair method of competition", are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honor-

able opponents in trade.' *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 40 S. Ct. 572, 575, 64 L. Ed. 993; *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 44 S. Ct. 162, 68 L. Ed. 448, 30 A. L. R. 1114. *Price cutting by itself, has never been considered unfair competition. Sears, Roebuck* v. *Federal Trade Commission* (C. C. A.), 258 F. 307, 6 A. L. R. 358." (Italics the writer's.)

Our position on this point is further supported by the decision in *State of Ohio* v. *Gullatt Cleaning, etc. Co.*, Court of Common Pleas, Hamilton County, Ohio, decided May 5, 1934, where the court, in considering the same language used in the state statute as in the National Industrial Recovery Act, said:

"Unfair trade and monopolies are familiar terms in the law and undoubtedly have received such general currency that most people know their meaning in a general way. But unfair trade or unfair competition in the meaning of the law, and also in the common understanding, has in it the element of fraud or misrepresentation, or other recognized unethical conduct.

* * * * * * * *

"Unfair competition does not include price cutting or any other method of acquiring trade that does not involve deception of the public or an infringement of the rights of the competitor. Nims on Unfair Competition (3rd Ed.), Sec. 300.

"The codes, which the act authorizes as binding upon all regardless of any contractual obligation, therefore, must be limited by the principle set forth in the law, that is, to regulations to eliminate unfair competition, prevent monopolies and discrimination against small enterprises. In other words, the prohibitory regulation must conform to the legal concept of unfair competition."

In still another decision emanating from the State of Ohio, decided in February, 1935 *wherein the precise price fixing and price control features of this Code of Fair Competition for the Motor Vehicle Retailing Trade was involved, the Court in holding unconstitutional the Ohio Industrial Recovery Act, said:*

> "This Court is of opinion that even waiving the foregoing for the purposes of this case that the Act itself does not purport on its face to authorize the so-called Code Authorities to fix the prices at which used automobiles may be taken in by a new car dealer. The most that the Act can be held to authorize is to adopt codes against 'unfair competition'. 'Unfair Competition' is not defined in the Act. It must, therefore, be held now to have the same meaning as had theretofore been given to it prior to the passage of the Act. As pointed out by Matthews, *Judge*, in *State ex rel. Schneider* v. *Laundry Co.*, 32 Ohio Nisi Prius (N. S.) at page 138:
>
> > 'Unfair Competition does not include price cutting or any other method of acquiring trade that does not involve deception of the public, or an infringement of the rights of the competitor • • •. The Legislature must be presumed to have known of this judicial definition of unfair competition when it enacted House Bill No. 705.'
>
> "See also *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 at 427; *Sears, Roebuck & Company* v. *Federal Trade Comm.*, 258 Fed. 307."

State ex rel. D. J. Haskins v. *Farber Motor Sales, Inc.*, in the Court of Common Pleas of Franklin County, Ohio, 143,980, as yet unofficially reported.

We respectfully submit, in view of the foregoing cases decided by this Court, and also authoritative decisions of lower courts involving the point raised herein, that the approval and adoption by the President of Article IV of

the Code of Fair Competition for the Motor Vehicle Retailing Trade, was beyond the scope of the provisions of the National Industrial Recovery Act, and such approval, even if administrative in character, is a nullity.

We submit further, that there can be no doubt, and it was so held by the statutory court in the case at bar, that the provisions of Subdivision A of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, are price regulation, price control and indeed price fixing. In view of this holding, we may look to the legislative intent of Congress in the debates on the National Industrial Recovery Act to learn and ascertain whether or not, under any conception of the Act, Congress authorized or even intended any price control, price regulation or price fixing. The following clearly negatives any intent to permit such price regulation or price fixing.

Senator Borah vigorously opposed the NIRA on the theory that it permitted price control by industry (77 Cong. Rec. 5264 *et seq.*, 1933) and offered an amendment, which was adopted by the Senate, reading as follows:

> "Provided such Code or Codes shall not permit combinations in restraint of trade, price fixing, or other monopolistic practices" (77 Cong. Rec. 5382).

In conference the provision was changed to read:

> "Provided such Code or Codes shall not permit monopolies or monopolistic practices" (77 Cong. Rec. 5933).

Senator Borah in a sharp attack upon the conferees contended that the aforesaid change had in fact validated price fixing (77 Cong. Rec. 5933, 5939 *et seq.*). In response to Senator Borah's contention, the purpose of the change of the Amendment offered by Senator Borah was explained by Senator Wagner (77 Cong. Rec. 5939.

See also 77 Cong. Rec. 5265, 5378, 5379, 5380). It was not the intention of the conferees, he argued, to permit monopolistic price fixing. The Bill, he thought, was explicit on that score. But the terms "restraint of trade" and "price fixing", he felt were broader than monopoly and, as construed by the Courts, *included not merely objectionable price fixing* but concerted action to fix minimum wages, to prevent sales below cost, and trade agreements which affected price. He further contended that it was not the intention of the sponsor of the Bill nor was the Borah Amendment so designed as to legalize direct price fixing.

No clearer manifestation of the legislative intent with regard to its view on price fixing can be found in any of the Congressional debates on the N. I. R. A., than the most succinct admission of Senator Wagner, the sponsor of the bill, wherein he says:

> *"I do not mean to imply that the pending legislation contemplates price fixing."* (Congressional Record, 73rd Congress, First Session, p. 5258, June 7, 1933.)

The statement of President Roosevelt on the signing of the NIRA (June 16, 1933), contains the following succinct declaration of policy particularly affecting the intention of the sponsors of the Bill and his own views with respect to price fixing. He said:

> "Let me make it clear, however, that the Anti-trust laws still stand firmly against monopolies that restrain trade and price fixing which allows inordinate profits or unfairly high prices."

The position and intention of Congress in the enactment of the NIRA, we submit, is clear. No reasonable doubt exists that price fixing was never contemplated in the enactment of the NIRA.

Even aside from the clear manifestation of the intention of Congress not to permit any price control or price fixing, such power never in fact existed in Congress by virtue of the Constitution.

It cannot be denied that Congress has no police powers, for to admit such proposition would be to deprive the States of the residuary powers expressly reserved to them by virtue of the Ninth and Tenth Amendments to the Constitution.

Upon the question of whether or not Congress has police power, Article X of the Constitution of the United States must be borne in mind and is as follows:

> "Powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people."

Police power is that right which is inherent in all sovereign governments to enact laws to promote the order, safety, health, morals and general welfare of its society. However, between States on the one hand and Federal Government on the other, the Government is not absolutely sovereign, for, under the contract existent between the forty-eight States of the Union and the National Government, this power was never given to the National Government, but within the provisions of Article X, *supra,* has always been reserved to the State, which are sovereign in the exercise thereof.

In *In re Rahrer,* 140 U. S. 545, at 554, the court well says:

> **"The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the states, not sur-**

rendered by them to the general government, nor directly restrained by the Constitution of the United States and essentially exclusive, and this court has uniformly recognized state legislation legitimately for police purposes as not in the sense of the Constitution necessarily infringing upon any right which has been conferred expressly or by implication to the National Government."

Page 555:

"In short, it is not to be doubted that the power to make the ordinary regulations of police remain with the individual states, and cannot be assumed by the National Government, and that in this respect it is not interfered with by the Fourteenth Amendment."

In *Keller* v. *The United States,* 213 U. S. 138, at 144, the court well says:

"Jurisdiction over such an offense comes within the accepted definition of the police power. *Speaking generally that power is reserved to the states for there is in the Constitution no grant thereof to Congress."* (Italics the writer's.)

In *Keller* v. *The United States, supra,* the Congress of the United States made it a Federal felony to harbor alien prostitutes. The act was held unconstitutional as a regulation of a matter within the police power reserved to the States and not within any power delegated to Congress by the Constitution, the court holding on page 148:

"That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. * * * While the acts

of Congress are to be liberally construed in order to enable to be carried into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. **To exaggerate in one direction and restrict in the other will tend to substitute one consolidated government for the present federal system.** We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, 725 that 'the Constitution in all its provisions looks to an indestructible union composed of indestructible states.'" (Emphasis ours)

Chicago, R. I. & Pacific R'way v. *Arkansas*, 219 U. S. 453;
Paterson v. *Kentucky*, 97 U. S. 501;
Barbier v. *Connelly*, 113 U. S. 27;
McCullough v. *Maryland*, 4 Wheat. 316;
Houston v. *Moore*, 5 Wheat. 148;
House v. *Mayes*, 219 U. S. 270.

As was well said in the *Civil Rights Cases*, 109 U. S. 3, at 14:

"If this legislation is appropriate for enforcing the prohibition of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property. If it is supposable that the states may deprive persons of life, liberty and property without due process of law (and the amendment itself does suppose this) why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights in every possible case, as well as to prescribe equal privileges in inns, public conveyances and theatres."

As was well said in the dissenting opinion in *Wilson* v. *New*, 243 U. S. 332, at 367:

> "It results from the principles which have been enforced in this Court and recognized by writers of authority that due process of law when applied to the legislative branch of the government will not permit Congress to make anything due process of law which it sees fit to declare such by the mere enactment of the statute; if this were true, life, liberty or property might be taken by the terms of the legislative act, dependent for its authority upon the will or caprice of the legislature and constitutional provisions would thus become a mere nullity."

In *Hammer* v. *Dagenhart*, 247 U. S. 251, Mr. Justice Day states:

> "There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such condition. In some of the states laws have been passed fixing minimum wages for women; in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in the use in other states and approved by Congress.
>
> The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce and not to give it *authority to control*

the states in their exercise of the police power over local trade and manufacture." (Italics the writer's.)

In *United States* v. *Eason Oil Co.*, 8 Fed. Supp. 365, following the authorities hereinabove quoted and in denying an injunction to restrain violations of an oil regulation of the Secretary of Interior, the Court stated:

> "But the fact that the state has power to fix intrastate prices or regulate intrastate business does not in any way justify the conclusion that Congress has the same power, for the only power that Congress has to deal with commerce, is to regulate commerce among the several states.
>
> Cooley in his Constitutional Limitations, Volume 2, 8th Edition, page 1232, said:
>
> 'In the American constitutional system the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. Neither can the national government through any of its departments or officers, assume any supervision of the police regulations of the States. All that the Federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the Federal Constitution.'"

See also:

United States v. *Gooch* (*supra*);
Miss. Valley v. *McClanahan* (*supra*);
Wilentz v. *Crown Laundry Service* (*supra*);
United States v. *Sutherland* (*supra*);
State of Ohio v. *Gulatt* (*supra*).

The Code comes neither within the provisions of the interstate commerce clause of the Constitution, nor can it be made a law of the land by Congress by reason of an assumption of the right to exercise a non-existent police power.

We believe that the foregoing has conclusively proven that Congress has no police power.

Assuming the same to exist, does N. I. R. A. come within the exercise of such power? As has been shown, the right of a State to legislate in matters encompassed within the police power is undoubted, so that it must follow that if a State in the attempted exercise of police power could not legislate with respect to the matters embraced in N. I. R. A. then no sovereignty could so legislate.

This is so, for police power is not enlarged by the importance of the Government seeking to exercise it. It arises from sovereignty, and when existent, is no more extensive for the most exalted Government than it is for the most humble. The sphere of the police power is the same for all governments.

It follows from the foregoing, that Congress never intended to legalize price fixing, price control or regulation, and in fact, never having that power, the Act of the President in approving Subdivision A of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, transgressed beyond the powers granted unto him.

We respectfully submit therefore, that Article IV, Subdivisions A and B (with the exceptions hereinabove noted), is void and invalid, and the attempt of the appellee to prosecute the appellant for an alleged violation thereof, is in direct violation of the fundamental provisions of the Fourteenth Amendment to the Constitution, and deprives the appellant of its liberty and property without due process of law.

POINT III.

The Code of Fair Competition for the Motor Vehicle Retailing Trade including Article IV thereof, and Chapter 781 of the Laws of 1933 of the State of New York, violate the Constitution of the State of New York, and the attempted enforcement of the provisions of said code by the appellee against the appellant deprives the appellant of its liberty and property without due process of law, in derogation of the Fourteenth Amendment.

In the discussion of the foregoing proposition, it is necessary to bear in mind the following dates:

1. June 16th, 1933, National Industrial Recovery Act adopted.

2. August 26th, 1933, Chapter 781 of the Laws of 1933, State of New York, in effect.

3. October 3rd, 1933, Code of Fair Competition for the Motor Vehicle Retailing Trade approved by the President of the United States. (In effect November 3, 1933.)

4. December 3, 1935, certified copy of Code of Fair Competition for the Motor Vehicle Retailing Trade filed with the Secretary of State of New York.

The pertinent provisions of Chapter 781 of the Laws of 1933, are the following:

NEW YORK

LAWS OF 1933, CHAPTER 781

(Effective August 26, 1933)

AN ACT to provide for codes of fair competition for trades, industries and subdivisions thereof.

Agreements, licenses, rules and regulations pursuant to the provisions of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state.

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. LEGISLATIVE FINDING; STATEMENT OF POLICY.—A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the state of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the state of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and

industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York.

§2. FILING OF CODES AND AGREEMENTS.—1. The secretary of state is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each code, agreement, license, rule or regulation in effect pursuant to such act of the congress, pertaining, affecting or in any way relating to the conduct of business in the state and duly certified as a true copy of such document or documents by the officials in charge of the administration of the provisions of title one of the said national industrial recovery act or by their duly authorized agents. Upon such filing of a copy so certified of a code of fair competition for any trade, industry or subdivision thereof, as approved by the President of the United States, or of any agreement or license or of any rule or regulation provided for under title one of the said National Industrial Recovery Act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, and any violation of any provision of such code, agreement, license, rule or regulation shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense, and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.

2. The secretary of state shall cause to be printed a sufficient number of copies of each such code, agreement, license, rule or regulation and the same shall be kept available for distribution upon request therefor.

3. If in any such code, agreement, license, rule or regulation, power is conferred upon any person or group of persons to subpoena witnesses, compel the production of books, papers and records, the attendance of witnesses or to take their testimony, a like power shall be deemed to have vested in such person or group of persons with regard to matters and things of a wholly intrastate character.

§8. DURATION.—This act, in so far as it affects agreements, codes, rules or regulations, shall become ineffective contemporaneously with the expiration of said national industrial recovery act, provided for by section two (c) of said act, and in so far as it affects licenses, contemporaneously with the expiration of the said National Industrial Recovery Act, as provided for in section four (b) of said act.

We respectfully contend that Chapter 781 of the Laws of 1933 of the State of New York, is invalid and unconstitutional being in derogation of the Constitution of the State of New York (a) in the manner of its enactment, and (b) as a delegation of legislative power by the New York State Legislature.

By Article III, Section 1 of the New York State Constitution, there is vested in the Senate and Assembly, the power to legislate. Article III, Section 17 of this Constitution, provides as follows:

> "No act shall be passed which shall provide that any existing law or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act."

The object, purpose and intent of said provision is tersely stated in the following two New York cases:

In *People ex rel. N. Y. Electric Lines Co.* v. *Squire*, 107 N. Y. 593, at page 602:

> "The object and intent of the constitutional pro-

vision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject, through ignorance and misapprehension on the part of the legislature, and to require that all acts should contain within themselves such information as should be necessary to enable it to act upon them intelligently and discreetly. It is obvious that it does not apply to an act purporting to amend existing laws, for in such a case no intelligent legislation could be had at all without a knowledge of the law intended to be amended. It must be presumed that the legislature is informed of the condition of a law which it is called upon to amend:"

In *People ex rel. Commissioner* v. *Banks*, 87 N. Y. 568, at page 575:

"* * * The evil in view in adopting this provision of the Constitution was the incorporating into acts of the legislature by reference to other statutes of clauses and provisions of which the legislators might be ignorant, and which affecting public or private interests in a manner and to an extent not disclosed upon the face of the act, a bill might become a law which would not receive the sanction of the legislature if fully understood."

The State Legislature at Albany makes N. I. R. A. and the Code the law of New York without the slightest knowledge of what the same contains; upon no consideration given them in its legislative debates and solely by reason of their enactment by another legislative body. In the light of the clear, unambiguous pronouncement of the Constitution of the State of New York, Chapter 781 is unconstitutional.

In further support of the above proposition, the holdings of sister States are most enlightening. The State

of Maine by reference adopted the Act of Congress with respect to intoxicating liquors and made it a law of that State. Its constitutionality being questioned, the Court held in *State* v. *Intoxicating Liquors*, 121 Me. 438:

> "It is clear upon reading the Act of 1919 that the legislature intended thereby to adopt and incorporate into the statute law of the State any definition of the term 'intoxicating liquors' * * * then or thereafter declared by congressional enactment or by decision of the Supreme Court of the United States.
>
> The precise question presented for our decision therefore is whether the Act of April 4th, 1919, so far as it purports to incorporate by reference into the section thereby amended, *future* enactments of Congress, establishing a rule, test or a definition of intoxicating liquors and declaring such liquors to be intoxicating * * * is valid.
>
> We have no hesitation in answering the question in the negative. Under a constitution in which the legislative power is vested, as in the Constitution of Maine, 'in two distinct branches, a House of Representatives and a Senate, each to have a negative on the other, and both to be styled the legislature of Maine' * * * *such legislation constitutes an unlawful delegation of legislative power, and an abdication by the representatives of the people of their power, privilege and duty to enact laws.*" (Italics ours.)

Passing upon the precise same point, in *Opinion of Justices*, 239 Mass. 606, the judiciary of Massachusetts held the same procedure unconstitutional, saying at page 609:

> "One distinguishing characteristic of that bill is that in several sections it incorporates by reference

laws made and to be made by the Congress of the United States, and regulations made and to be made thereunder, for the purpose of establishing offenses to be punished by fine. It is attempted by these sections and possibly by other sections to make the substantive law of the Commonwealth in these particulars change automatically so as to conform to new enactments from time to time made by the Congress and new regulations issued pursuant to their authority by subsidiary, executive or administrative officers of the United States.

It purports to create offenses and impose punishments therefor, not by definition and declaration, but by reference to what may hereafter be done in these particulars by the Congress of the United States, and thus by it authorized to establish regulations.

We are of opinion that legislation of that nature would be contrary to the constitution of this Commonwealth. Legislative power is vested exclusively in the General Court, except so far as modified by the initiative and referendum amendment. It is a power which cannot be surrendered or delegated or performed by any other agency.

This firm general principle is not affected by the fact that by the Eighteenth Amendment to the Federal Constitution, 'concurrent power to enforce National Prohibition' by appropriate legislation as 'vested in Congress and in the several States.' The words 'concurrent power' do not imply a surrender by either to the other of the power to legislate."

Page 611:

"There are numerous instances where power to establish local ordinances or administrative regulations may be vested by statute in a subsidiary governmental division or in a Board or Commission. **No discussion is required to demonstrate that the Congress of the United States cannot be treated**

as a subsidiary board or commission by the General Court." (Emphasis ours.)

In addition to the foregoing authorities, three New York State Supreme Court decisions condemn the New York State Recovery Act (Chapter 781 of the Laws of 1933), in well written opinions. In the first, *Darweger* v. *Staats*, 156 Misc. 522, the Court had this to say (in part):

> "The plaintiff here is not engaged in interstate commerce. His business is a purely intrastate business. All of his purchases are made and all of his sales are made within the State of New York. While the questions presented by the National Industrial Recovery Act are of the gravest importance; while they involve questions which may determine the continued existence, or the destruction of our constitutional system of government, it is not for this Court to determine such questions upon these motions. The NIRA of itself does not and cannot control the manner in which plaintiff shall conduct his business, or fix the price at which he shall sell his product while engaged in purely intrastate transactions. It has not yet been held under the Constitution that the Congress has control of purely intrastate commerce.
>
> It is claimed, however, that the plaintiff is bound by the Code adopted by the National Recovery Administration under the NIRA relative to his business, because of the provisions of the so-called Schackno Law (Chap. 781, Laws of 1933). This contention necessitates an examination of such enactment.
>
> The Schackno Act, §1, declares the existence of a national emergency, using the identical language of the NIRA, then inserts similar declarations that the emergency likewise exists in this state, and affects the welfare and undermines the standard of living of the people of the State of New York, and

declares that the emergency, the causes and effects thereof as declared in the national Act, relate as well to commerce wholly intrastate in character as to interstate and foreign commerce. It then provides that it is declared to be the policy of the state to co-operate in the furtherance of the objects and purposes declared in the national Act, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce, as required by the provisions of the NIRA.

Section 2 authorizes the filing of certified copies of codes in the office of the Secretary of State, and provides—

> 'Upon such filing of a copy so certified of a code of fair competition for any trade, industry or subdivision thereof, as approved by the president of the United States, or of any agreement or license or of any rule or regulation provided for under title one of the said national industrial recovery act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, and *any violation of any provision of such code, agreement, license, rule or regulation shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense,* and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.' (Italics ours.)

Section 3 invests the Supreme Court of the State of New York with jurisdiction to prevent and restrain violations of any codes filed pursuant to the act.

Section 5 suspended the operation of the state anti-trust laws during the time the act was in effect.

It is urged that this Act merely declares the policy of the state to co-operate and provides the means by which the declared legislative intent is to be carried into effect.

Undoubtedly the general rule laid down and uniformly followed is, that a statute may validly provide that the object or the standard of the statute may be attained through a form of procedure or administration found in or pursuant to some other enactment (*People ex rel. Commissioners* v. *Banks*, 67 N. Y. 568; *People ex rel. Everson* v. *Lorillard*, 135 N. Y. 285; *Watkinson* v. *Hotel Pennsylvania*, 195 App. Div. 624, aff'd 231 N. Y. 562). The fact that the operation of a statute in particular instances is dependent upon or affected by a future contingency in no way affects its validity (*People* v. *Long Island Railroad Co.*, 134 N. Y. 506; *Stanton* v. *Board of Supervisors*, 191 N. Y. 428; *People ex rel. Unger* v. *Kennedy*, 207 N. Y. 533). 'Mere novelty is no objection to legislation' (*People ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429; *People* v. *Nebbia*, 262 N. Y. 259, 271).

The Schackno Act does more than merely declare a policy and provide means to carry it into effect. The NIRA is not adopted, but it is declared to be the policy of the State of New York to conform in intrastate commerce and transactions with its purpose and administration. Codes adopted under the NIRA are made, though not in existence, by reference those of the State of New York. The act adopts not a law of the Congress, but a body of rules and regulations prepared by individuals, approved by an administrative authority and finally approved by the President, and then provides that upon filing a certified copy in the office of the Secretary of State, a violation of any provision of such

code so adopted and filed, is a crime under the laws of the State of New York. *To term such a method of legislation, such a manner of attempting to create criminal offenses, vicious, is to indulge in mild criticism. To hold such a legislative act constitutional seems contrary to the plain language and import of our fundamental laws, both national and state.*

The Constitution of the State of New York provides (Article III, §1): 'The legislative power of this State shall be vested in the Senate and Assembly'; and by §17 provides, 'No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act.'

The vast increase in public business, the justifiable or unjustifiable invasion of business affairs through government intervention and the complexities of modern civilization are indicative of the fact that public business cannot be transacted today without some delegation of power to administrative officers or bodies. When the legislative act prescribes a method and declares a policy there has been a continuous advance in the granting to administrative bodies and executive officials power and authority to adopt rules and prescribe methods for carrying such enactments into effect. The Schackno Act, however, does not vest in any state authority power to enact rules and regulations or exercise legislative power. It does not provide a criminal penalty for the violation of the act itself, but prescribes a criminal penalty for *'any violation of any provision of such code, agreement, license, rule or regulation'. It thus creates a crime for the violation of something which did not exist when the act was adopted, of the terms, conditions or provisions of which the legislature could have had no knowl-*

edge or information and of a body of rules and regulations to be prepared by some individuals unknown, adopted by a Federal administrative body and approved by the Chief Executive of the United States.

The legislative power is vested in the Senate and Assembly. The nation is still an 'indivisible union of indestructible states'. The state within its boundaries is sovereign. The laws that govern its citizens in purely intrastate matters within its borders and the acts which will convert its citizens into criminals must be those specified by the state and its authority.

The legislature cannot delegate the sovereign powers of the state to an administrative or executive authority of a foreign jurisdiction. It cannot surrender the sovereignty of the state to declare the acts constituting a crime to Federal executive or administrative authority.

> 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people' (Art. X, U. S. Constitution, 10th Amendment).

It seems to us, without attempting to enter into any extended analysis or discussion, that such a statute is violative of the provisions of the Constitution of the State of New York above referred to, as well as contrary to every principle upon which our republican institutions are based.

While the issues in this case are not identical, we agree with the reasoning and conclusions expressed in *Cline* v. *Consumers Co-operative Gas & Oil Co.*, 152 Misc. 653, in which the question of the constitutionality of the Schackno Act is clearly and learnedly discussed. Our conclusion is likewise sustained in *People* v. *Grant*, App. Div., Third Dept., November 2, 1934, unreported. The language there

used applies with equal force to the Schackno Law—'While the legislature may delegate the power to make rules and regulations and give them the force of law, it may not delegate the power to create crimes and prescribe the penalties therefor.' Under the Schackno Law the legislature has attempted to delegate the power to make rules and regulations and give them the force of law to Federal authority and granted to that authority the right to specify and create crimes in the State of New York. 'The legislative discretion to declare a crime has been attempted to be delegated to the board. This is not only the delegation of an administrative act, but also the delegation of the substantive power to determine a crime.' (*People* v. *Grant, supra.*) We can see no distinction except that in the Schackno Law, the power to declare what acts shall constitute the crime is attempted to be delegated by the legislature to Federal administrative authority instead of state administrative authority. Clearly under such conditions the attempt is in violation of the constitution of the state." (Italics ours.)

And concluded with the following:

"We hold that Subdivision 1 of §2 of Chapter 781, Laws of 1933, is in violation of the Constitution of the State of New York, Article III, §§1, 17, and void; *that it is an unwarranted attempt to delegate the power to create a crime; that the declaration of the acts constituting a crime rests with the legislature and cannot be delegated to Federal administrative or executive authority.*" (Italics ours.)

In the second case, *De Agostina, as President, etc.* v. *Parkshire Ridge Amusement Inc.*, the Supreme Court of the State of New York, Kings County, when called upon to decide the constitutionality of Chapter 781 of

the Laws of 1933, on February 2nd, 1935 (93 New York Law Journal, p. 63), again declared the same to be invalid in an opinion which reads in part as follows:

> "If the reasoning thus far be fallible, there nevertheless remains a complete answer to the defendant's claim. The defendant's brief vigorously asserts that its action was founded on the N. I. R. A., the Motion Picture Code adopted under it, and the State Recovery Act, and that it was under the compulsion of these that the plaintiffs were discharged. But this assertion is met by the plaintiffs' argument that the N. I. R. A. and the code adopted under it have no application to the facts and that the State Recovery Act is unconstitutional.
>
> That congressional justification for the N. I. R. A. is derived from the 'commerce clause' of the United States Constitution is plainly apparent from a reading of the statute. The defendant concedes that, inasmuch as its business is conducted wholly within the state with no feature of it involving or affecting interstate or foreign commerce, the provisions of the N. I. R. A., standing alone, are inapplicable to the facts presented. The defendant's case is rested on the State Recovery Act. Section 1 thereof declares the existence of a national emergency, prevailing likewise in the State of New York, which burdens intrastate, interstate and foreign commerce recognizes that the declaration of emergency contained in the N. I. R. A. relates as well to intrastate commerce within this state; and announces it to be the policy of the state 'to cooperate in the furtherance of the objects and purposes declared in said act of Congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of

the said N. I. R. A. which are applicable in interstate commerce in the State of New York.' Section 2 provides for the filing with the secretary of state of codes and agreements approved and licenses issued pursuant to the provisions of the N. I. R. A. affecting the conduct of business in the state. Violations of the codes or agreements so filed are declared to be misdemeanors punishable by a fine of not more than $500 for each offense and for each day such violation continues. Section 3 vests the Supreme Court with jurisdiction to restrain the violation of any code or agreement filed pursuant to this act and to restrain any act within the state tending to defeat or hamper the effectiveness and operation of the N. I. R. A. at the instance of any party whose interests are or may be adversely affected by such violations or acts.

The desirability of subjecting those engaged in intrastate commerce within the state to the same standards of fair competition applicable to those engaged in interstate commerce within the state cannot be questioned. Nor may one doubt that the method adopted by the state to equalize standards of commercial conduct is calculated to prevent duplication with its attendant expense and perhaps confusion. But these considerations, salutary as they may be, cannot be employed as a means of levelling constitutional barriers. While the State Recovery Act does not purport to make the N. I. R. A., or any of the codes adopted thereunder the law of this state, it does provide that in the field of intrastate commerce violations of the federal statute and the codes may be punished or restrained where such violations occur within the state. The Legislature has not alone declared a policy but has created a new crime, the definition of which is left to agencies foreign to the state. By indirection the entire machinery for the adoption of codes and agreements and the issuance of licenses

under the federal statute is carried into the state act. The question is whether this short cut to a perhaps desirable end is sanctioned by the state constitution. Article III, section 17 of the Constitution reads as follows: 'No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act.' In *People ex rel. N. Y. Electric Lines Co.* v. *Squire* (107 N. Y. 593, 602), the court said:

'The object and intent of the constitutional provision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject, through ignorance or misapprehension on the part of the Legislature, and to require that all acts should contain within themselves such information as should be necessary to enable it to act upon them intelligently and discreetly.' While a constitutional provision intended to operate as a restraint upon the Legislature is not to be so construed as to embrace cases not fairly within its general purpose or policy (*People* v. *Lorillard*, 135 N. Y. 285, 288) it is not to be so construed as to nullify the constitutional limitation. In this case the court is not free to assume that the State Legislature was familiar with the terms and provisions of N. I. R. A. or that it was even familiar with its broad outlines. Nor can it be assumed that the law would have been adopted had the Legislature been fully acquainted with the N. I. R. A. Whether the Legislature acted with full knowledge of what was being done or through ignorance or misapprehension is left to conjecture. For all that appears the Legislature was not exercising its own judgment but relying solely upon the wisdom of the federal enactment. It has thus

accomplished the very evil sought to be avoided by the constitutional prohibition.

Article III, section 1, of the State Constitution provides that 'The legislative power shall be vested in the Senate and Assembly.' This power may not be abdicated by delegation to others. A Legislature may, however, delegate to some other agency of the government the power to determine facts and conditions upon which the operation of the statute depends (*People ex rel. Doscher* v. *Sisson*, 222 N. Y. 387; *Matter of Trustees of Village of Saratoga Springs* [*Saratoga Gas, &c., Co.*], 111 N. Y. 123). That some future contingency controls the operation of the statute does not affect its validity (*People ex rel. Unger* v. *Kennedy*, 207 N. Y. 533). Once the legislative policy is outlined and its controlling general principles fixed, an administrative agency, within the limitations prescribed, may be charged with the duty of carrying the statute into operation (*Panama Refining Co. et al.* v. *Ryan et al.*, 78 Adv. Op. 233, 55 Sup. Ct. Rep. 241; *United States* v. *Shreveport Grain & El. Co.*, 287 U. S. 77; *United States* v. *Grimaud*, 220 U. S. 506; *Buttfield* v. *Stranahan*, 192 U. S. 470). It seems to have been assumed in all of the decisions on the subject that the administrative agency employed, if not the creature of the Legislature, is at least an agency of the state or government whose law is being executed. *But here the Legislature has left the operation of the state statute, not to any state administrative agency, but to the President of the United States.* Under the N. I. R. A. the President is empowered to adopt codes and agreements affecting industries engaged in interstate commerce and yet if the State Recovery Act be upheld, the President would be given a like power over purely intrastate transactions. It may be urged that the Legislature, in exacting compliance with the codes and agreements in so far as they affect intrastate commerce

within the state, has merely invoked the machinery existing under the N. I. R. A. as the most practical means of equalizing standards of fair competition. Assuming for the moment that the means adopted is more practical and convenient than the establishment by the state of its own code authorities modeled after the federal system, that alone presents no justification for what has been done. Extreme caution should be exercised in safeguarding the state's sovereignty. The Legislature should neither invite federal encroachment nor surrender to foreign agency, over which it has no control or supervision, powers given solely to it by the people. 'Illegitimate and unconstitutional practices get their first footing by silent approach and slight deviations from legal modes of procedure' (*Boyd* v. *United States*, 116 U. S. 616, 635). While co-operation between the state and federal government for the achievement of some end may be highly desirable, such co-operative action must not involve an obliteration of state lines and a surrender of the state's inherent powers.

It may be said that no harm can result and much good may be accomplished by upholding this particular legislation. But if the state's power to delegate governmental functions to a foreign agency is sanctioned, there can be no legitimate limits to its exercise. As was said by Chief Justice Marshall in *Brown* v. *Maryland* (12 Wheat. 419, 439): 'Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.' *The vice of the State Recovery Act lies in the fact that the procedure therein adopted, if approved, will facilitate subservience by the state or by its political subdivisions to a foreign entity not representative of or responsible to the citizens of the state whose local interests are being affected. The dangerous implications*

involved in any such state of affairs must be apparent.

In *Darweger* v. *Staats* (153 Misc. 522) the court, on an application for a temporary injunction restraining the members of the Divisional Code Authority of the Retail Solid Fuel Industry from interfering with the conduct of the plaintiff's business, fixing or attempting to fix the price at which he might sell his products within the state, or instituting proceedings against him for violation of the code provisions, held the State Recovery Act unconstitutional. In doing so, it was observed that 'the legislative power is vested in the Senate and Assembly. The nation is still an "indivisible union of indestructible states." The state within its boundaries is sovereign. The laws that govern its citizens in purely intrastate matters within its borders and the acts which will convert its citizens into criminals must be those specified by the state and its authority.' The Legislature cannot delegate the sovereign powers of the state to an administrative or executive authority of a foreign jurisdiction. It cannot surrender the sovereignty of the state to declare 'the acts constituting a crime to federal, executive or administrative authority' (p. 529). The opinion contains an excellent resume of the authorities together with the conflicting decisions which have arisen under the State Recovery Act." (Italics ours.)

It might be noted at this point that the two latter decisions were decided *subsequent* to the rendition of the opinion and decision in the case at bar, and the State courts refused to follow the reasoning of the lower Court in the case at bar.

In still another New York Supreme Court decision (*Cline as President of Independent Retail Petroleum Prod-*

ucts Dealers of Jefferson County v. *Consumers Cooperative Gas & Oil Co.*, 152 Misc. 653), in dismissing the Complaint of the plaintiff which sought to restrain the defendant from violating the price fixing provisions of the Petroleum Code, the Court declared the New York State Recovery Act unconstitutional in an elaborate opinion which we respectfully quote in part——

> "But, aside from this, the motion is made for a dismissal of this complaint on the further ground that the Schackno Act is unconstitutional in that the Legislature has no power to delegate to the President of the United States the power to legislate within the State of New York. The Constitution of the State of New York, Article III, §1, provides:
>
> > 'The legislative power of this State shall be vested in the Senate and Assembly.'
>
> Having so vested it, it has been uniformly held that they have no power to divest it, even to the people themselves. In other words, the Constitution of the State of New York created a representative form of government, and, for purposes of legislation, the people of the State made the Senate and Assembly, elected by them, their representatives for the purposes of legislation.
>
> *People* v. *Bradley*, 207 N. Y. 592.
>
> Certain limitations upon this power have been noted.
>
> In *People* v. *Kennedy*, 207 N. Y. 533, the Court of Appeals well said:
>
> > 'The proposition that by our constitution general powers of legislation are conferred exclusively upon the legislature, and that this body may not escape its duties and responsibilities by delegating such legislative powers to the people at large,

must be regarded as so thoroughly established that it needs no discussion.'

Now this subject of the power of the Legislature of the State of New York to delegate legislative power has been the subject of much consideration by the courts of this state. It has been said that, while the question of the expediency of an act, or of its operation, cannot be delegated, the Legislature may pass an act the operation of which in particular instances is dependent on or affected by a future contingency.

People v. *Long Island,* 134 N. Y. 506.

It has also been held that the Legislature may delegate to the electors of a restricted locality to determine whether a completed enactment passed by the Legislature shall become operative or shall be taken advantage of.

People v. *Kennedy,* 207 N. Y. 533;
Stanton v. *Essex County,* 191 N. Y. 428.

Here there were completed pieces of legislation applicable to a locality, and the Court held that giving the people of the locality the right to vote as to whether this particular piece of legislation should be operative upon them did not constitute a delegation of legislative power. It has been the uniform practice for the Legislature to confer upon municipalities of the state the authority to enact and enforce ordinances to execute and carry into operation the powers granted.

Buffalo v. *Stevenson,* 207 N. Y. 258.

It has been held that the Legislature may confer upon boards of health the power to enact sanitary ordinances.

Bellows v. *Raynor,* 207 N. Y. 389.

One of the most interesting cases on the subject

arose in reference to a grant of power to a public service commission to fix maximum rates to be charged by public service corporations. This was, on its face, such a delegation of legislative power that the matter was given voluminous consideration by our Court of Appeals in the case of

Saratoga Springs v. *The Saratoga Gas & Power Co.*, 191 N. Y. 123.

And the question was again considered in the case of

People v. *Wilcox*, 194 N. Y. 383.

Stripped of all learned discussion on the subject, it comes down to this: that, while the Legislature had the undoubted power, subject to the limitations of the Fourteenth Amendment to the Federal Constitution, to fix rates, it also had the power to enact that there should be maximum rates fixed and to provide that the public service commission, after full hearing, could fix a reasonable maximum rate. The decision rather turned on the practicalities of the situation. There are hundreds of municipalities in this state with different conditions and circumstances, with public service corporations serving them under peculiar and different states of fact and law, to such an extent that it is utterly impractical for the Legislature to legislate in each particular case; and the Court of Appeals held that giving the public service commission, under the restriction contained in the legislation, the power to fix reasonable maximum rates did not constitute an unlawful delegation of legislative power.

There are other instances of apparent delegation of power to make regulations, as in the Educational Department; but in every instance the law itself is declared by the act of the Legislature, and the regulations must follow within the law and are really details in administration of the law, rather

than delegations of power to make a law. The decisions of the courts in this state are unanimous upon the proposition that the Legislature of the state may not delegate its power to legislate to anyone.

The instances above noted where this has apparently been done by the Legislature, and the acts sustained by the courts, are not true instances of delegation of power to legislate; they are cases where the law has been declared by the Legislature, and the regulations are either purely administrative in character or, as possibly in the instance of the public service commission, quasi-judicial and subject to review at all times by the courts as to whether (1) the regulations are within the law and (2) whether they are reasonable or operate in violation of the Bill of Rights in the State Constitution or the Fourteenth Amendment to the Federal Constitution. Even in going the little way that the Court of Appeals has gone in this matter, it has expressed the view that, while the Legislature itself could have adopted these regulations, (and, to that extent, there was an apparent delegation of legislative power,) where the Legislature had set up a standard of action or had declared a principle of law and then authorized a public body to make regulations to carry it out, these regulations were really administrative in character. The Court has realized the point where representative government ends and bureaucracy begins.

It will be noted that whatever delegation of legislative power for administrative purposes has been allowed, has been allowed to public bodies set up by the Legislature of this State. A prime illustration of it is the creation of municipalities, with a definition of their powers, with an authorization to pass ordinances to make effective in the community the powers granted. The act creating the municipality was a completed act. As in other instances

where there are so many different conditions applying to different communities, and different methods of executing powers granted, it would be a practical impossibility for the Legislature to make specific rules and regulations denominated as municipal ordinances to enforce the powers granted to a municipality. And that is true of other administrative or quasi-judicial bodies created by the Legislature.

In the present instance we have an entirely different situation. The Schackno Bill *delegates a power to legislate, not to any agency of the State created by it, but to a foreign agency which in its nature has no powers of legislation excepting the power to veto Congressional bills, to wit, the President of the United States.* Under the National Industrial Recovery Act, the President is given the power to do three things: (1) to approve Codes prepared by the representatives of an industry or industries engaged in interstate commerce, subject to the limitations heretofore noted; (2) of his own motion, if complaint is made to him that practices inimical to the public interests and contrary to the policy declared in the Act are prevalent in any trade or industry, and, if no code of fair competition has been approved, after public notice and hearing to prescribe and approve a code of fair competition for such trade or industry, which shall have the same effect as a code of fair competition approved by the President under subsection '(a)' of this section (§703, subsection '(d)', N. I. R. A.); (3) to enter into agreements with and approve voluntary agreements between and among persons engaged in trade and industry, labor organizations, etc.,

> 'if in his judgment such agreements will aid in effectuating the policy of this chapter with respect to transactions in or affecting interstate or for-

eign commerce and will be consistent with the requirements of clause (2), subsection "(a)" of section 703 for a code of fair competition.'

If, under the State Constitution, this same power had been delegated to the Governor of the State, then we would have had the issue as to whether or not the powers delegated did amount to a delegation of legislative power contrary to the decisions of the Court of Appeals and in violation of the provisions of the State Constitution; and the issue then would be whether or not the legislation amounted to an actual delegation of power, as distinguished from authority to establish rules for carrying into operation a power granted by the Legislature. There can be no doubt that, on constitutional grounds, the Legislature has no power to delegate powers of legislation, *and in no event to a non-state-created agency.* I must therefore hold that the attempt to do this, as set forth in the Schackno Bill, is beyond the power of the Legislature.

It is urged that this is emergency legislation. The question, of course, as to whether there is an emergency is a question of fact, and it is assumed that, so far as the purposes of the Court are concerned, the declaration of the Legislature is sufficient evidence of the fact; but an emergency never awakened into existence a non-existing power. The power to declare war exists in Congress, and of course war creates an emergency, and legislation under the power which otherwise might be declared to be unconstitutional will perhaps be sustained, within proper limits, under the war power. Great catastrophes, such as flood, drought, earthquake, or questions of public health, seriously affecting the welfare of the country, under the Federal Constitution lay the foundation for the expenditure of public funds to relieve the catastrophe; and this of course applies, within proper limits, to such a

calamity as the depression through which we are passing, where the public welfare is involved. (United States Constitution, Article I, §8.)

Under the Commerce Clause, which grants to Congress the power to 'regulate commerce with foreign nations and among the several states,' the power of Congress is plenary to the extent that legislation is directed to that end.

There is no power, nor has there been any decision which recognizes a power in Congress to fix prices, either of labor or commodities. There is one case where price-fixing has been approved, and that is the case of *Wilson* v. *New*, 234 U. S. 332, which is a very interesting decision. As will be recalled, we were threatened in this country with a general strike on all the railroads of the United States; the railroads could not agree with their employees as to what wages would be paid. In the emergency, Congress passed a law temporarily establishing a standard of wages, pending a final agreement on the subject between the railroads and their employees, in order that commerce might continue. The issue in that case was whether Congress had the right to do that. Generally speaking, the right was denied by the Supreme Court of the United States in that case, excepting on account of an emergency which meant the total destruction of interstate commerce—and then only temporarily, until wages could be established by agreement. The force of this decision of course must be limited to the state of facts involved. In that case the Court held that an emergency did not create a power, that the power must exist apart from the emergency, and that, existing, the emergency might awaken the exercise of the power. That was an extreme case. The power never existed in Congress, under the United States Constitution, to deal with intrastate commerce; and, never existing, no emergency can awaken the exercise of it.

By analogy, *there is no power in the Legislature of the State of New York to delegate any of its legislative powers to any outside agency, as to the Federal Government or to the President of the United States.* To do so is to impair the sovereignty of the State itself. The source of authority in state government is the people of the state; and, because our state governments were in existence at the time of the Revolution, it has been generally assumed, and is the accepted judicial view, that the Legislature in a state has plenary law-making power, excepting as it has been limited by the express provisions of the State Constitution or by the Fourteenth Amendment to the United States Constitution. With these exceptions, the Legislature has plenary power and as to its acts there is no question of constitutionality involved.

Not so, however, with the Federal Government:— it has such powers, and only such powers, as are delegated to it by the Constitution directly or by necessary implication; all other powers are reserved to the States or the people.

If Congress had delegated to the President the power to legislate in reference to intrastate commerce, such power would be a nullity, as beyond the powers of Congress.

In the instant case, under the National Industrial Recovery Act the Congress made no attempt to deal with intrastate commerce; it only dealt with interstate commerce. If there is any dealing with intrastate commerce in the Code under question, it is by reason of the act of the industrial associations and the President, or the President alone, without any power derived from the National Industrial Recovery Act. *So that we have, in the present instance, in so far as the Code has any application to intrastate commerce, the act of an individual, outside of his powers as President of the United States; and the Legislature of the State of New*

York, under the Schackno Bill, has attempted to delegate to that individual its powers of legislation. This is beyond its power to do. If the Legislature had delegated to the Governor of this State the powers that it has delegated in the Schackno Bill to the President of the United States in reference to intrastate commerce in the same form that it made that delegation to the President of the United States, I do not believe that such delegation would be sustained as being within the power of the Legislature, in the absence of the setting up of a standard of fair competition, leaving only to the Governor or any other state body or agency the power to make rules to carry into execution the powers delegated.

In the Code of Fair Competition for the Petroleum Industry, at Rule 4 of Article V thereof, there is set up a standard of fair competition, as hereinbefore noted. Here is an attempt to set up a standard of fair competition, and an agency is created with the power to establish regulations to carry into effect the law designed to maintain such a standard; and, under the present circumstances, it may well be that the legislation by the State Legislature to the same effect, set forth in the act, would be sustained as a proper exercise of legislative power and not an unauthorized delegation of legislative power,—subject, however, as to its actual operation in any particular case, to the limitations of the State Constitution and of the Fourteenth Amendment to the Constitution of the United States.

We have heretofore considered the Schackno Bill upon its merits. There is in the State Constitution a provision which expressly denies to the Legislature the power to legislate by reference. Article III, §17 of this Constitution provides:

'No act shall be passed which shall provide that any existing law, or any part thereof, shall

be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act.'

This provision has been for many years in the Constitution of this State. The evils sought to be avoided by it are well set forth in the case of *The People ex rel. Commissioners* v. *Banks*, 67 N. Y. 568. I am of the opinion that this provision is effective to cover an act of Congress or the Codes adopted in pursuance thereof. The Codes, once approved, are designed to have the effect of law. The State Legislature, by this section, is prohibited from legislating in the manner in which it has legislated in Chapter 781 of the Laws of 1933, in so far as it attempts to provide that the National Industrial Recovery Act shall be the law of this State by mere reference to the Act; and this of course applies to the Codes adopted thereunder. The National Industrial Recovery Act was an existing law, to be sure, of Congress; but if the Legislature is prohibited from making an existing law of the State a part of an act, by mere reference, how much more should the provision apply to an existing law of the United States or of any other State in the Union? And this would apply alike to Codes adopted in pursuance of an existing Federal Law. For this reason, if for no other, the Schackno Act, in so far as it incorporates by reference the National Industrial Recovery Act and makes it, by mere reference, a part of the Schackno Act, is void, in that it constitutes an attempt to legislate in a manner prohibited by §17 of Article III of the State Constitution. *And this principle with greater force would apply to legislation which would incorporate as a part of the law of the State of New York any future law which Congress might enact or which any agency named by Congress*

might in the future promulgate in the form of a Code.

Therefore, so far as the plaintiff bases any right upon the so-called Schackno Bill, (Chapter 781, Laws of 1933) the complaint must fall." (Italics the writer's.)

The latter case is comparatively similar to the case at bar, and the Court clearly upholds the contentions of the appellant respectfully urged herein.

The State of California (in *People of State of California* v. *Capital Cleaners & Dyers*, Superior Court of the State of California, County of Los Angeles) held that part of the California Industrial Recovery act, providing that national codes are to supersede state laws upon approval, was invalid, because of the unwarranted delegation of legislative power. The Court said in part:

"The legislature, if so minded, may adopt by reference an existing statute of some other state or of the United States, and such adopted statute becomes effective as a part of the adopting statute, and probably the same rule would apply to any existing administrative regulation or draft of a code, or body of law purporting to deal with the subject of legislation, even though never enacted by any legislative body; *but here the legislature has attempted to adopt prospectively codes not in existence and whose terms were necessarily unknown when it passed the statute.* The regulations contained in the code now under consideration, while possibly within the letter of the very general language of reference contained in the California statute, relate to a considerable number of subjects which, have heretofore been highly controversial as to the necessity, propriety and constitutionality of public regulation in regard thereto. Not only is

there an entire absence in the statute of any legislative approval of the particular regulations made by the code on these subjects, but there is no declaration of the necessity or propriety of any regulation whatever on any of these subjects and no indication that the legislative mind was turned to them all. We think the provision of this statute purporting to adopt these future codes is an unwarranted delegation of legislative power. The legislature may delegate the power to determine some fact or state of things upon which the law makes or intends to make its own action depend, but the provisions of the national code which plaintiff seeks to enforce in this action are much more than such a determination. As applied to the present subject-matter, the statute was practically an abdication of its functions by the legislature. It amounted to an attempt to delegate to others 'its exclusive power and function of determining what acts or omissions on the part of an individual are unlawful', and this it had no power to do. *In re Peppers*, 189 Cal. 682; *In re McLain*, 190 Cal. 376, 381; *People* v. *Parks*, 58 Cal. 624, 643; *Schaezlein* v. *Cabaniss*, 135 Cal. 466, 470; *Englebretsen* v. *Industrial Acc. Comm.*, 170 Cal. 793, 797; *Ex parte Cox*, 63 Cal. 21. In the matter of prices to be charged, the legislature has not even attempted to adopt the schedule set up in the complaint. The reference in the statute runs only to the national code, not to the acts of subordinate agencies which may be set up under it." (Italics ours.)

On January 28, 1935, subsequent to the decision rendered in the case at bar, the Circuit Court of Appeals (Lucas County, Ohio), was called upon to determine the validity of the Ohio Industrial Recovery Act and the question of delegation of power thereunder.

Adhering to the opinion of this Court in the case of *Amazon Petroleum Corp.* v. *Ryan et al.*, 260, January 7, 1925, it declared the said State Act unconstitutional as an unwarranted delegation of legislative power. This Ohio State Act is practically similar to the provisions of Chapter 781 of the Laws of 1933 of the State of New York. The short opinion follows:

> "CROW, *J.* This case, which is here on appeal, originated in the common pleas court of Lucas County, Ohio, by petition wherein the State of Ohio on relation of the Prosecuting Attorney of said County sought an injunction against a retail dealer in coal in Toledo, Ohio, to prevent violation of a code adopted pursuant to the act at page 603 and following, 115 Ohio Laws, which we will refer to as the Ohio Act.
>
> On the trial in this court defendant conceded that he had not complied with certain requirements of the code, namely: that he had not contributed to the expenses of its administration; that he had not made any report pursuant thereto, and that he made and would continue to make sales below the code prices.
>
> There was no evidence tending to prove that he in any manner participated in or encouraged the formulation or establishment of the code, nor did he in any way consent thereto.
>
> Provisions of some of the codes adopted in Ohio pursuant to the statutes we have referred to, have come before courts of common pleas of the State with the result of discord concerning fundamentals, but neither the Supreme Court, nor any of the Courts of Appeals of Ohio has decided any of the many questions raisable in relation to any of the codes adopted under the act.
>
> Without treating any of the decisions of the common please courts, we hold that the decision of

the Supreme Court of the United States, January 7, 1935, in the case of *Amazon Petroleum Corp.* v. *Ryan et al.*, No. 260, and the reasoning of the opinion of the eminent Chief Justice, are decisive of the case we have here.

The Ohio act under which the code was established with which defendant has not complied in the particulars we have alluded to, possesses in essence the identical infirmities found by the Supreme Court of the United States in the Federal statute which was the subject of controversy in the case cited.

We could not, were we inclined to so undertake, add to or take from the reasoning of the opinion of the learned Chief Justice, for, as would have been expected from him, the reasoning is perfect.

Therefore, without further words, we find that as to the matters requiring decision in the case at bar, the provisions of the Ohio act under which the code in issue arose, are invalid in that the act in its relation to such matters is an unwarranted delegation of legislative power to an administrative officer, the Governor of the State and to other persons sought to be authorized with him to formulate codes.

The finding and judgment will therefore be for the defendant at the costs of plaintiff.

Since the foregoing was written, there has come to our knowledge the decision of the Court of Appeals of Hamilton County, Ohio, in the case of *Riesenberg* v. *Divisional Code Authority, etc., et al.*, which perpetually enjoined defendants from taking steps to determine the reasonable cost of retailing solid fuel in so far as it affected plaintiff, and from attempting to prevent the sale of solid fuel by him below the cost determined by defendants, on the ground that defendant Divisional Code Authority No. 23 Retail Solid Fuel Industry had not been granted authority by the Ohio Act to determine the

lowest reasonable cost of retailing solid fuel or to prevent the sale of solid fuel under said cost as determined, the court having found that plaintiff had not signed the code of fair competition of the Retail Solid Fuel Industry.

No opinion was filed in the case, but it is clear that the court decided the Ohio Act ineffectual to authorize the prevention of the sale of coal under the cost fixed by the code. To that extent the decision was in accordance with our holding in the instant case. We understand that case to be now pending in the Supreme Court of Ohio.

In the case at bar a judgment and decree will be rendered for the defendant and the petition dismissed.

Judgment and decree for defendant."

The foregoing opinion is quoted from *State of Ohio ex rel. Frazier Reams, Prosecuting Attorney, Lucas County* v. *Edward Dusha,* doing business as City Coal Company, Court of Appeals, Lucas County, Ohio, No. 3003, January 28, 1935. (Not officially reported yet.)

Relying upon this latter decision of the Circuit Court of Appeals, we find still another lower court decision of Ohio declaring the Ohio Industrial Recovery Act unconstitutional. The opinion reads, in part, as follows:

LEACH, *J.*:

"On Motion for Temporary Injunction.

In view of the decision of the Court of Appeals of Lucas County announced on Jan. 28, 1935, reversing the decision of the Common Pleas Court of that County in the case of *State, ex rel. Reams* v. *Edward Dusha, etc.,* numbered in the Common Pleas Court 140, 434, in which the Court of Appeals holds H. B. 705, 115 O. L. 603, to be an unwarranted and unconstitutional delegation of legislative

power, which decision is (with the exception of the decision of the Hamilton County Court of Appeals affirming the decision of Judge Mack, hereinafter referred to), the first decision of one of the higher Courts of this State on the subject matter, and as said decision is in harmony with the rule which has long obtained in this State, being announced in *C. W. & Z. R. R. Co.* v. *Comm'rs of Clinton County,* 1 Ohio State 77, and also in *Harmon* v. *State,* 66 Ohio St. 249, as well as in line with and directly based on the principles decided and reaffirmed in *Panama Refining Co. et al.* v. *A. D. Ryan* ('Hot Oil' Case) decided by the Supreme Court of the United States, on Jan. 7, 1935, this Court is of opinion that those parts of the act, H. B. 705, 115 O. L. 603, involved in this case are an unlawful and unconstitutional delegation of legislative power. See to same effect, *United* v. *Kinnebrew Motor Co.,* 8 Fed. Supp. 535; *Hart Coal Corp.* v. *Sparks,* 7 Fed. Supp. at page 28.

This Court is of opinion that even waiving the foregoing for the purposes of this case that the Act itself does not purport on its face to authorize the so-called Code Authorities to fix the prices at which used automobiles may be taken in by a new car dealer. The most that the Act can be held to authorize is to adopt codes against 'unfair competition'. 'Unfair Competition' is not defined in the Act. It must, therefore, be held now to have the same meaning as had theretofore been given to it prior to the passage of the Act. As pointed out by Matthews, *Judge,* in *State ex rel. Schneider* v. *Laundry Co.,* 32 Ohio Nisi Prius (N. S.) at page 138:

> 'Unfair Competition does not include price cutting or any other method of acquiring trade that does not involve deception of the public, or an infringement of the rights of the competitor

* * *. The Legislature must be presumed to have known of this judicial definition of unfair competition when it enacted House Bill No. 705.'

See also *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 at 427. *Sears, Roebuck & Company* v. *Federal Trade Comm.*, 258 Fed. 307.

The foregoing was approved by Alfred Mack, *J.*, in the case of *State, ex rel. Schneider* v. *Ben Reisenberg*, Court of Common Pleas of Hamilton County, No. A-45544.

There is no showing made by the evidence in this case that the price as shown in the book published by the National Automobile Dealers Association for the Series B Wolverine, Model alleged to have been taken in at a price higher than the price fixed by the N. A. D. A. book was fixed as the Code itself provides, assuming the validity of the Code and assuming the National Automobile Dealers Association, a trade association incorporated under the laws of Illinois and having its principal office at No. 1010 Pine St., St. Louis, Mo., and not being a citizen of, or organized in Ohio, can properly be made the repository of powers or authority granted by the Legislature of Ohio." (*State, ex rel., D. J. Hoskins, etc.* v. *Farber Motor Sales, Inc.*, Court of Common Pleas of Franklin County, Ohio, No. 143,980, decision rendered on the day of February, 1935, as yet unofficially reported.)

For an elaborate opinion which was relied on by the Court in *Hoskins* v. *Farber Motor Sales Co. Inc.*, just cited, we respectfully refer this Court to the case of *State of Ohio* v. *Gullatt Cleaning & Garment Co., supra*, and *State ex rel. Schneider* v. *Laundry Co.*, 32 Ohio Nisi Prius (N. S.) at page 138.

We have respectfully referred to some lower court decisions involving the constitutionality of State Acts to

wit: The Industrial Recovery Acts of the States of California, Ohio, New Jersey and New York as expressive of the trend of judicial opinion thereon in view of the fact that this Court has not, but for the case at bar, been called upon to determine the constitutionality of the various State Industrial Recovery Acts.

The reasoning of the foregoing cases exposes the rationale of the Constitutional provisions of the State of New York.

The Assembly and the Senate are vested with the authority of legislative power in this State (Article III, Sec. 1, New York State Constitution), and by Article III, Section 17, it is the expressed will of the State that that power may not be delegated to any other body or instrumentality.

The Legislature cannot secure relief from its duties or responsibilities by a general delegation of legislative power to someone else.

People v. *Grant*, 242 App. Div. 310;
People v. *Tremaine*, 252 N. Y. 27, 44.

The arguments heretofore asserted in Point I of this brief under the topic of "Delegation of Legislative Power", are applicable even with more force to the New York State Act than it is to the National Industrial Recovery Act. We therefore respectfully incorporate the authorities and contentions heretofore expressed as applicable to the New York State Recovery Act.

If there is any doubt with respect to the fact that Congress, in the enactment of the National Industrial Recovery Act, delegated its legislative functions to the President of the United States, and by him re-delegated to his agents, boards and so-called code authorities, *there can be no doubt* but that the Legislature of the State of New York, by Chapter 781, divests itself of all power, whether it be administrative or legislative.

The power to enact the Codes is delegated by the State Legislature *not to its own authorities,* but to the national authorities, and by them in turn, to the respective persons and associations who in fact enact the codes.

It has never been contemplated under any constitutional form of government, to permit the enactment of penal statutes to others than the Legislature. Of course, if the Legislature itself enacted the particular provisions of the Code in the fashion in which it enacted the Milk Control Law (*People* v. *Nebbia,* 291 U. S. 502), a different situation would then be existant.

A particular code of law enacted into the penal statutes of a State, must necessarily be scrutinized by the various legislative committees, and public hearings had thereon, as well as discussions, debates, and actual vote thereon, in the open Assembly or Senate.

The Code of Fair Competition for the Motor Vehicle Retailing Trade became the law of the State of New York not by the will of the Legislature of this State, not after hearing, discussion, and vote, but solely by virtue of the certified copy thereof which was filed with the Secretary of State of New York. Suffice it to say, that when Chapter 781 was enacted, *the Code was not yet in existence,* and did not come *into being until three months thereafter.* Obviously, the Legislature of the State of New York is ignorant of its contents, despite the fact that a violation thereof puts one in the category of a criminal. How shocking it is indeed to a citizen of the State of New York to be dragged into a Criminal Court and charged with a crime bearing the severe penalties of fine and imprisonment upon a penal statute never in fact enacted by the citizen's own elected representatives.

No greater deprivation of life, liberty and property guaranteed to a citizen under the Fourteenth Amendment, can possibly be shown than that which is exemplified by the form and substance of the Statute, Chapter 781 of the

Laws of 1933. To paraphrase the language of one of New Jersey's prime Chancellors, this is indeed "vicious legislation".

We may adopt the spirit, but we may not make the law by injecting into our statutes a reference to the United States Code, or Minnesota law or Japanase law, by merely calling it our law. The Legislature must establish its own standards and laws; it cannot draft others, it must enact them.

To permit the appellee to prosecute the appellant for an alleged violation of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, said prosecution being based upon the provisions of Chapter 781 of the Laws of 1933, would be to deprive the appellant of its liberty and property without due process of law, and in manifest derogation of the protective safeguards of the Fourteenth Amendment.

POINT IV.

Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade with respect to the provisions prohibiting the granting of an allowance on a traded in automobile, in excess of the arbitrary figure established in the so-called "Official Guide Book", is invalid and void in that it abridges the freedom of contract and deprives the complainant of its liberty and property without due process of law, in derogation of the Fourteenth Amendment to the Constitution.

The Code of Fair Competition for the Motor Vehicle Retailing Trade secures its life basically from two legislative acts and one executive act. The two legislative acts are the National Industrial Recovery Act, and Chapter 781

of the Laws of 1933 of the State of New York commonly known as the New York State Industrial Recovery Act. The executive act is the Presidential sanction and approval of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

We have heretofore discussed the legalistic defects of these respective legislative and executive acts in detail. If any of such acts, be they legislative or executive, are found to be in contravention of basic constitutional mandates, then it follows that the enforcement of any of the provisions of this Code of Fair Competition in the State of New York against the appellant, would effectually deprive the appellant of its liberty and property without due process of law.

It is here necessary to point out the fundamental distinction between the constitutionality of the respective Recovery Acts as distinguished from the constitutionality of the Code itself or any of the particular provisions thereof, promulgated thereunder. If it can at all be held that the Recovery Act is constitutional, this would not of itself, justify or sanction the formulation and adoption of Codes which contain provisions violating the due process clause—the Fourteenth Amendment. This fundamental distinction is tersely summed up in the following article taken from the Minnesota Law Review of February, 1934:

> "Mention should be made of the confusion which is present in current discussion of the constitutionality of the Recovery Act, arising as it does out of an assumption that because a code may contain something which is unconstitutional the recovery act itself is invalid. The act is not to be judged by the codes or agreements formulated under it. Codes may be formulated which are not authorized by the statute. The statute will not be unconstitutional merely because those who administer it fail to fol-

low it. The code provisions may in some instances be illegal, or they may be unconstitutional, but the recovery act is to be judged on its own merits, on what it authorizes to be done, and not upon what is done in its name. Many questions of statutory interpretation and administrative law doubtless will come before the courts because of the act, but these are to be distinguished from questions of the constitutionality of the act itself. Due process imposes a standard of reasonableness not only upon the act itself, but also upon the administrative actions taken in pursuance of it. Actions taken must be reasonable, and if the act does not fix any standard the due process clause does so, and the courts will apply that standard. But if the act fixed a standard which is reasonable, and the administrators fix an unreasonable standard, it is the administrative action which is invalid, not the statute."

These observations are significant for they correctly indicate that the particular provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade attacked herein, may be held unconstitutional without necessarily invalidating the entire Recovery Act.

We respectfully submit as our first proposition herein that Article IV (R. 23, 24, 25), Subdivision A, Paragraphs 1, 2, 3 and 4 thereof, is unconstitutional when scrutinized under constitutional tests.

The right of a merchant to buy and sell the products of his trade (in the case at bar automobiles) and to contract about his affairs, is a part of the liberty of the individual protected by the Fifth and Fourteenth Amendments, and settled by a long line of decisions.

Adkins v. *Children's Hospital* (1923), 261 U. S. 525, 67 L. Ed. 785;

Tyson & Bros. v. *Banton* (1926), 273 U. S. 418, 71 L. Ed. 718;

Fairmont Creamery Co. v. *Minnesota* (1927), 274 U. S. 1, 71 L. Ed. 893;
New State Ice Company v. *Liebmann* (1932), 285 U. S. 262, 76 L. Ed. 747;
Wolff Packing Co. v. *Court of Industrial Relations* (1923), 262 U. S. 522, 67 L. Ed. 1103;
McFarland v. *American Sugar Co.* (1916), 241 U. S. 79;
Ribnik v. *McBride* (1928), 277 U. S. 350;
U. S. v. *Trenton Potteries Co.*, 273 U. S. 392;
Williams v. *Standard Oil Co.*, 278 U. S. 418;
United States v. *Cohen Grocery Co.*, 255 U. S. 81;
Sterling v. *Constantin*, 287 U. S. 378.

The right to deal, to sell, or trade the products of one's labor or services, is property, and subject to the protection of the Fourteenth Amendment (cases *supra*).

Under the foregoing authorities, the provisions of Article IV of the Code attacked, must be declared to be unconstitutional for the said provisions violently collide with the safeguards of the Fourteenth Amendment and the holdings of this Court (*supra*).

No doubt the appellee will urge before this Court as authority for upholding the provisions of Article IV of the Code of Fair Competition, under attack, the decision of this Court in *People* v. *Nebbia*, 291 U. S. 502. We shall hereinafter show that the provisions of Article IV of this Code, when tested by the rule laid down by this Court in *People* v. *Nebbia*, are found to be unreasonable, arbitrary and capricious. The succinct rule stated by this Court in the said case, is as follows:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action,

> do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. *And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.*" (Italics ours.)

and further:

> "• • • *Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.*" (Italics ours.)

Economic liberty rests upon the right of private contract, and the essence of all private contract and the normal course of business conduct, is price. It has always been the general aim of both our Federal and State Governments to preserve and enlarge individual opportunity and to stimulate private initiative by permitting price freedom. From time immemorial, it has been held that "freedom is the general rule and restraint the exception" (*Adkins* v. *Children's Hospital, supra*). Public policy has been to protect freedom of contract in industry and to condemn any attempt of impairment and possible destruction of such freedom by monopoly.

Under certain circumstances, there has been a digression from this avowed policy for the protection of the health,

morals, and general welfare of the community under the sanction of police power.

Under the guidance of the aforementioned principles, the relevant facts in the case at bar, reveal:

Today, practically all new automobiles are sold through the automobile dealer. The automobile dealer is a merchant operating under "an agency" contract with a manufacturer of automobiles wherein the said dealer agrees to purchase from the manufacturer a given quantity of automobiles at a given price and to retail the same subject to certain general directions of sale and service established by the manufacturer.

These dealers sell these new automobiles upon one of two bases. The first is an outright sale of an automobile for a stated consideration. This consideration may be either paid in cash or amortized over a period of time (conditional sale). The second method of sale is one where the purchase price is paid for in part by the exchange and delivery to the dealer of an old automobile for an agreed price, the balance of the consideration being paid for in cash or amortized over a period of time. The latter method is commonly known as a "trade-in" sale and constitutes more than 85% of all sales made of new cars.

Prior to the adoption of Article IV, Subdivision A, of the Code of Fair Competition herein, automobile dealers were in no wise restrained from ascertaining and allowing upon trade-ins, such values as they, in their discretion, determined. The determination of course, was based upon market conditions, the economic law of supply and demand, the particular manufacture of the particular car, its then condition, age, model, style and year. In other words, the dealer was only subject to the effects of normal competitive conditions amongst his fellow dealers and free to contract for a trade-in in accordance therewith. Obvi-

ously, the automobile dealer was in the same category in his particular trade as all other businesses are in their particular fields.

As we have heretofore shown, unless tainted with fraud or deception, such competition has never been deemed to be unfair (Point II of this Brief).

By the provisions of Article IV, Subdivision A thereof, a plan is evolved which prohibits the dealer, under severe penalty of fine and imprisonment, from allowing to prospective purchasers a value upon a trade-in in excess of the arbitrary maximum allowance figure arrived at in the "Official Guide Book" promulgated under the provisions of Article IV.

Article IV, Subdivision A, provides in part as follows:

> "(1) That the value of any model of used motor vehicle, either passenger or commercial, shall be the average price that the public in any given market area is then paying for such vehicle, as ascertained by the Association from sworn statements of all actual retail sales to consumers, subject to the approval of the Administrator. The Association shall publish the average prices thus ascertained approximately every 60 days. In order to insure fair average value in the interest of the consumer, published averages shall be computed for the preceding period and there shall not be included in computing such average that 20% of sales which represented the lowest sales of all actual sales reported in the previous period.
>
> (2) That no dealer shall, directly or indirectly, or by subterfuge, accept in trade any used vehicle at an allowance price of more than its value as ascertained in paragraph (1) above, less a minimum selling, handling, and reconditioning charge, according to the following schedule:
>
> (a) Five percent of the allowance price as de-

termined in paragraph (1) above, on (x) the current series model or (y) the preceding series model.

(b) Ten percent of the allowance price as determined in paragraph (1) above on the model preceding, the two models described in paragraph (2) sub-section (a) above, namely (x) and (y).

(c) Fifteen percent of the allowance price as determined in paragraph (1) above, on all models other than the three models described in sub-sections (a) and (b) above.

(3) To provide a record for the establishment of used car allowances in paragraph (1) above, there shall be provided in each logical trading area of the United States an Official Guide, which shall be provided by the Association which shall be known as the Association Official Guide and shall be recognized as the authority for such allowances, and which shall be based upon actual sales in each trading area for the period of approximately sixty days preceding the date on which the compilation of the official guide is started, as hereinabove provided.

(4) There shall be used as a basis of establishing allowance values as provided in paragraphs (1) and (2) above, the principle of averaging actual sales at retail to consumer for the preceding period. Since this will, in isolated instances, by reason of very few or no sales on particular models, leave a need to establish a guide figure on such models, the following method of determining the allowance values will be pursued for the public protection, namely:

(a) If any model of motor vehicle described in the Official Guide shows five or more sales at retail to consumer within the district in any period, then the *average* figure published becomes the maximum allowance for the ensuing period."

In Subdivision B of Article IV, it is provided in part that no dealer sell a new car at retail to a consumer for less than the factory list prices, plus contemplated fixed charges for additional equipment, taxes, transportation and the cost of handling.

It is to be particularly noted that a maximum allowance figure is established through a process of *averages, i. e.,* the *average* is the maximum. This average maximum figure *per se,* is arbitrary and capricious for it serves to deny to approximately one-half of all purchasers trading in automobiles, a fair and true value for their used automobile so offered. The average, to be a true average, must contemplate a given number of units below the average and a given number of units above the average. Such is the normal computation of an average. It is immediately obvious and apparent that to prohibit an allowance in excess of the maximum average so established, is to deny to the purchasers whose automobiles are worth more than the average, a fair and actual value for their trade-ins. As a practical matter, it places a premium upon prudent, careful handling of an automobile, because the prospective purchaser who has carefully preserved his automobile is prohibited from receiving its true value on a trade-in and can only in fact realize but the "average" established.

The automobile dealer is in no wise restrained from allowing to a prospective purchaser the fair value of an automobile if perchance the old automobile comes within the *lower* bracket of the figures used in the determination of the average. In other words, a car worth less than the average, can be traded in at a fair and actual value for it is worth less than the maximum established and therefore the dealer will not offer more than the maximum for the said car.

With respect to the car worth the average, obviously the maximum average will be allowed. It is apparent, therefore, from the mere contemplation of the word "aver-

age"; that it serves to deny to the prospective purchaser whose car is worth more than the average, the actual and fair value of his traded in automobile.

As to the cars lower than the average, or at the average, the provisions of Article IV are useless and baseless, for in such event a prospective purchaser receives the actual value of his car.

Such provisions which deny to a prospective purchaser the actual trade-in value of his automobile, if the said automobile is above the average, is obviously unreasonable, arbitrary and capricious. It serves to abridge the freedom of contract between the dealer and the purchaser for the dealer is prohibited from contracting with a prospective purchaser to allow him a fair and actual value of his car although that value be more than maximum average arrived at in the Official Guide Book.

It serves further to deny to a prospective purchaser whose car is above the average, the equal protection of the law for he may not receive the actual and fair value of his traded in automobile whereas the purchaser whose car is worth less than the average or the average, may contract to receive the actual and fair value thereof.

As a practical matter, this arbitrary standard serves to defeat the alleged purposes of the National Industrial Recovery Act. The prospective purchaser whose car is worth more than the average, seeking to purchase a new automobile, is compelled to take one of three courses. First, accept the arbitrary average established. This would deny to such a purchaser the fair and true value for his trade-in, and would create for the dealer a double profit, a profit that he had never theretofore enjoyed. The dealer would not only make a profit upon the sale of a new automobile, but upon a resale of the trade-in, he could realize the true value of the trade-in because no restraint exists upon the outright sale of the used car as such. Second, if the prospective purchaser did not desire to be victimized by such

a capricious standard, he could then abstain from purchasing. This is the normal reaction of a person in any trade who is refused a fair consideration upon any sale. That this actually happened in a great number of cases, cannot be denied, for immediately after the adoption of the Code, a sharp reduction in the purchase of new automobiles ensued (R. 165, 166).

It is most significant to note that despite the general improvement of industrial conditions throughout the Nation, the volume of new car sales in the Metropolitan area of New York, has fallen approximately 40% upon the immediate adoption of the Code.

We need not burden this Court in this brief with the effect of the provisions of Article IV, Subdivision A, but respectfully refer this Court to the Affidavit of David B. Spielman, for a complete review (R. 140, 37).

A sharp reduction in the volume of sales necessarily results in a sharp reduction in employment and the eventual frustration of the purposes of the National Industrial Recovery Act with respect to the automobile industry and the kindred trades dependent thereon.

The third course that a prospective purchaser followed was to seek out some dealer who was willing to assume the jeopardy of violating the provisions of Article IV, having the apparent sanction of law, so that there might be a fair and honest exchange of values. Somewhat paradoxically—law abiding citizens conspired to evade the law in order that there might be an honest exchange of values.

At the outset of Code enforcement, violation thereof was not rife but as the inequality of the arbitrary standard created justification in the mind of man—the prospective purchaser—we find violation gaining in momentum, until today violation is the rule and adherence the exception.

Such arbitrary standard created by this average further served to undermine the equilibrium of the trade with respect to those prospective purchasers who possessed trade-

ins worth less than the average. The Official Guide Book figures became greatly publicized so that even those prospective purchasers with old automobiles worth less than the average, sought in many instances, to secure the maximum that the law permitted. They travelled from dealer to dealer until one was found who was so eager and zealous to obtain a share of "legitimate" business that he consummated a trade at the maximum Guide Book figure.

We respectfully submit that "this is not regulation, but management, control, dictation—it amounts to the deprivation of the fundamental right which one has to conduct his own affairs honestly and along customary lines" (*People* v. *Nebbia, supra,* dissenting opinion).

To sustain the argument of the defendant herein "would support general prescription of prices, for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some Legislature finds and declares such action advisable and for the public good. This Court has declared that a state may not by legislative fiat, convert a private business into a public utility (*Michigan Comm.* v. *Duke*, 266 U. S. 570; *Frost Trucking Co.* v. *R. R. Comm.*, 271 U. S. 583; *Smith* v. *Cahoon*, 283 U. S. 553). And if it be now ruled that one dedicates his property to public use whenever he embarks upon an enterprise which the Legislature may think it desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution" (*People* v. *Nebbia, supra,* dissenting opinion).

The formula that Courts have employed is that only the price of those industries which are affected with a public interest may be regulated. *It is respectfully submitted that the retail automobile industry bears no such relation to*

the public as to warrant its inclusion in the category of business charged with the public use, and as such may not be regulated.

Undeniable support of the contention of the appellant that its business is not such as is vested with a public interest or "a public use" is found in two cases hereinabove referred to.

In the *New State Ice Company* case, *supra*, the validity of an Oklahoma statute which, in substance, compelled an ice dealer to procure a certificate of public convenience and necessity as a condition precedent to dealing in ice, was invalid. This Court in that case held the statute void under the Fourteenth Amendment. The prevailing opinion of Mr. Justice Sutherland reads in part:

> "Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use."

The *New State Ice Company* case was reviewed as recently as 1932.

In the *Wolff Packing Co.* case, *supra*, this Court held invalid a statute purporting to declare that the meat packing business was one "affected with a public interest" and thus to permit fixing wages. The opinion of Chief Justice Taft, in part, says:

> "It has never been supposed, since the adoption

of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest *that theories of his product or his wages could be fixed by state regulation.*" (Italics ours.)

and further says:

"• • • the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

"In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product, and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above, where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large."

In the *Fairmont Creamery Co.* case, *supra*, the statute involved undertook to require every buyer to adhere to a uniform price fixed by a single transaction. *This Court decided that such legislation in the fixation of price was a clear infringement of private rights.*

In the *Adkins* case, *supra*, a board of three was given the power to fix minimum wages for women and children. The Court held the statute violative of the Due Process

Clause of the Fifth Amendment. The prevailing opinion says (p. 558):

> "In principle there can be no difference between the case of selling labor and *selling goods.* • • • Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed." (Italics ours.)

The retail automobile industry inherently and unquestionably is a private business and as such may not be converted into public business by legislative fiat.

> *Producers' Transp. Co.* v. *Railroad Comm. of California,* 251 U. S. 228, 230, 40 S. Ct. 131, 64 L. Ed. 239;
>
> *People ex rel. Durham Realty Corp.* v. *LaFetra,* 230 N. Y. 429, 442, 130 N. E. 601, 16 A. L. R. 152.

The extraordinary feature of the present price fixing provisions that declare an ordinary individual to be guilty of a crime with a drastic remedy of fine or complete annihilation of his business through licensing power granted to the President, all because a retail storekeeper insists upon his property right to contract at a price satisfactory to himself and his customers is a most unreasonable and oppressive deprivation of the inherent rights of an individual. The Federal and State Constitutions are not things merely to be extolled in academic halls or be the subject of juvenile orations, but are vibrant and designed to safeguard not only life and liberty but also property rights in times of stress and suffering when despairing and

desperate majorities seek by forbidden methods the subversion of fundamental principles of Government.

If the effort manifested by this Code to regulate private conduct by fixation of prices of a private business which cannot conceivably be vested with a public interest, be sustained then the extension of similar statutes to every trade and every occupation to illimitable bounds can reasonably be expected.

This Court in the *New State Ice Company* case, *supra*, forcefully expounds the position of the defendants in the case at bar, when it says (p. 278):

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistently with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them.' (*Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513, and authorities cited; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 113."

We respectfully submit that upon any theory, either under the decisions of this Court decided prior to *People* v. *Nebbia*, and even in accord with *People* v. *Nebbia*, the provisions of Article IV discussed herein, must be deemed unconstitutional.

Article IV, Subdivision B, Sections 1 and 2, read as follows:

> "B. MARKETING RULES
>
> "The following Marketing Rules shall take effect 30 days after the approval by the President.

(1) No dealer shall sell a new car at retail to a customer for less than factory list prices, plus an amount equal to——

(a) Equipment at listed prices.

(b) All taxes paid by dealer applicable to the motor vehicle sold.

(c) Average cost of transportation from factory of said dealer or shipments received by said dealer during a 60 day period as shown by sworn statement of said dealer.

(d) Dealer's actual cost of handling (including such items as (w) unloading, (x) assembling, (y) conditioning for delivery, and (z) interest actually paid by said dealer, but not to exceed 90 days on cost of transportation).

The only exceptions to these prices shall be sales to proprietors' immediate families or members of his organization when for the personal use of such buyer. Motor vehicles sold to employees for use in their employer's business as demonstrators or executives' cars, and cars used as demonstrators by dealer, must be so registered with their trade association, or with the State Advisory Committee; demonstrators' and executive cars shall not be sold to a consumer at retail for less than the full retail price except when they have been in use for a period of at least 60 days from the date of registration, as aforesaid, and have had at least 3,500 miles actual road usage, or when the manufacturers have made public announcement of a change in model:

(2) No dealer or representative shall offer or give any discount, gratuity, commission, service, or accessory, to a customer or his agent, for the purpose of inducing the customer or his agent to purchase a car. Nothing herein shall prevent conduct pursuant to any warranty of the manufacturer."

In accordance with the foregoing provisions of Article IV, to deny the right to a motor vehicle retail dealer to allow a prospective purchaser an actual and fair trade-in value on his automobile, though the said value be in excess of the Official Guide Book figure, is to effectually fix the price of the new car purchased, for, under the provisions quoted, a dealer is prohibited from selling an automobile at less than factory list price, plus certain additional charges. The dealer is thereby deprived of the competitive lever when consummating a sale of a new automobile on the trade-in plan. The dealer is "straight-jacketed", by being prohibited from selling a new car below the factory list price and being prohibited from allowing a trade-in value at more than the maximum average, if the car is actually worth more than the said maximum figure, and thereby all competitive means are removed from the automobile dealer. He is left straddled and hamstrung by the provisions of this Code.

As we have heretofore pointed out, the essential aim of Government has been to preserve and enlarge individual opportunity and to stimulate private initiative by promoting price freedom. Under the National Industrial Recovery Act, we have sought to improve competitive conditions, but not to eliminate them. The competitive system is the only economic system consonant with the spirit of Democratic institutions.

The most specious plea advanced for price control is that it is needed and required to meet the Code minimum wage requirement. If A and B pay the same wages, neither A nor B needs special price protection because the increase in labor costs, if properly enforced, applies to the whole industry. If they represent the marginal fringe of industry and cannot exist without price protection, it is not sound public policy to support such groups.

There is no reason why an entire industry should be

hamstrung to protect this marginal fringe from the cost burdens of the minimum wages of the Codes.

Under a long series of decisions rendered throughout the land, the provisions of Article IV, Subdivision B, subsection 2, have been declared invalid and unconstitutional as an unlawful interference with liberty and permitting a deprivation of property without due process of law. The provisions referred to prohibit a dealer from giving any so-called "commission, gratuity, discount, service or accessory, to a customer or his agent, for the purpose of inducing the customer to purchase a car".

There is nothing inherently unfair in such competitive means and neither is there any substantial relation between the giving of such commission, gratuity, etc., to a proper governmental end.

Innumerable cases have held that the practice of giving premiums for the purpose of inducing the purchase of merchandise is not unlawful, and the attempt to restrict such practice has been declared to be unconstitutional. The extent of the practice is indicated by the number of judicial decisions to the effect that statutes prohibiting the use of trading stamps on merchandise, amount to an unconstitutional interference with liberty and permit a deprivation of property without due process of law.

Some of the cases to this effect are as follows:

State v. *Hawkins*, 95 Md. 133, 144;
State v. *Caspare*, 115 Md. 7;
City & County of Denver v. *United States Stores Co.*, 189 Pac. 848; 68 Colo. 363 (1920);
United Cigar Stores Co. v. *People*, 190 Pac. 1117; 68 Colo. 546 (1920);
Opinion of Justices, 115 N. E. 978; 226 Mass. 613 (1917);
Commonwealth v. *Sisson*, 278 Mass. 578; 60 N. E. 385;

Montgomery v. *Kelly*, 142 Ala. 552; 38 So. 67;
Ex Parte McKenna, 126 Cal. 429; 58 Pac. 916;
Ex Parte Drexel, 147 Cal. 763; 82 Pac. 429;
Ex Parte West, 147 Cal. 774; 82 Pac. 434;
Denver v. *Frueauff*, 39 Colo. 20; 88 Pac. 389;
Hewin v. *Atlanta*, 121 Ga. 723; 49 S. E. 765;
United Cigar Stores Co. v. *Stewart*, 144 Ga. 724; 87 S. E. 1034;
Territory v. *M. A. Grant & Co.*, 18 Haw. 196;
Sperry & Hutchinson Co. v. *State*, 188 Ind. 173; 122 N. E. 584 (1919);
Lawton v. *Stewart Dry Goods Co.*, 247 S. W. 14 (1923);
Sperry & Hutchinson Co. v. *Owensboro* (1912), 151 Ky. 389;
O'Keefe v. *Sommerville*, 190 Mass. 110; 76 N. E. 457;
Opinion of Justices, 208 Mass. 607; 94 N. E. 848;
People ex rel. Atty. Gen. v. *Sperry & Hutchinson Co.*, 197 Mich. 532; 164 N. W. 503 (1917);
State ex rel. Simpson v. *Sperry & Hutchinson*, 110 Minn. 378; 126 N. W. 120;
State ex rel. Hartigan v. *Sperry & Hutchinson Co.*, 94 Neb. 785; 144 N. W. 795;
State v. *Ramseyer*, 73 N. H. 31; 58 Atl. 958;
People ex rel. Marden v. *Dychur*, 72 N. Y. App. Div. 308; 76 N. Y. S. 111;
People ex rel. Apple v. *Zimmerman*, 102 N. Y. App. Div. 103; 92 N. Y. S. 497;
Winston v. *Hudson*, 135 N. C. 286; 47 S. E. 1023;
State v. *Dalton*, 22 R. I. 77; 46 Atl. 234;
Trading Stamp Co. v. *Memphis*, 101 Tenn. 181; 47 S. W. 136;

State v. *Holtgrave* (1921), 58 Utah 563; 200 Pac. 894;
State v. *Dodge*, 76 Vt. 197; 56 Atl. 983;
Young v. *Commonwealth*, 101 Va. 853; 45 S. E. 327.

The proponents of the provisions of Article IV of this Code undoubtedly will urge before this Court that the State of New York exercised its true police powers in the enactment of Section 781 of the Laws of 1933 and of the provisions of this Code. With this contention we take serious issue when we refer to the principles of law and arguments asserted herein with respect to the unlawful delegation of legislative functions by the State of New York to the Federal Government and to the President. The argument is set forth more fully in Point III of this Brief.

The State of New York did not, we submit, exercise its prerogative by legislating in the name of police power. It merely enacted Chapter 781 of the Laws of 1933 as an alleged aid to the Federal Government in the enforcement of the provisions of the Codes adopted pursuant to the National Industrial Recovery Act. The provisions of this Code in the manner of their enactment are quite distinct and clear from the provisions of the statute, to wit, the Milk Control Law of the State of New York which was discussed in *People* v. *Nebbia, supra*. There can be no sincere intimation by anyone, that the State of New York expressly, and under the name of police power, enacted the provisions of Article IV of this Code. *The State Legislature never saw, heard nor read the provisions of this Code.* It came into existence on October 3rd, 1933, in effect November 3rd, 1933, and the apparent law of the State of New York on December 3rd, 1933, by the mere filing of a certified copy thereof. In fact, the operation of this Code is being administered in the State of New York by a non-

State agency, to wit, the National Automobile Dealers Association, a trade association incorporated under the laws of the State of Illinois, with its principal office in the State of Missouri. This Association compiles the figures for the Official Guide Book, and through its agencies, attempts to secure enforcement of the provisions of this Code in the State of New York. What power or right an Illinois corporation can have in the administration of Code provisions in the State of New York, is beyond the conception of the writer! Certainly, no warrant of authority exists in law either under the New York State Constitution or under the Federal Constitution for a foreign corporation—a non-state agency—to enforce and administer New York State Laws against the citizens of the State of New York.

While we realize as we must, that the competitive system is not wholly perfect, it is the only economic system consonant with the spirit of Democratic institutions. Under the National Industrial Recovery Act, we have sought to improve and possibly supplant the system by a new economy based on the theory of benign cooperation. This theory is not new, for it has been tried again and again by all commercial peoples. Economic history is replete with records of its failure. Economic institutions can be torn down and rebuilt, but there is no possibility of reconstructing human nature. We are beginning to understand that when individual groups gather to plan their economic salvation, they are rarely dominated by a broad, social purpose. The natural and thoroughly human objective is to control and regulate the price making process for the benefit of the group rather than the general public. Under this system, there is no redress for the consumer. If we cannot trust the self-interest of the individual in price making, the worst possible substitute is the enlightened self interest of the industrial or trade group.

Our Codes are chiefly charters for the elimination, rather

thun the improvement of competition. We have wandered far from the original purpose of eliminating unfair competition based on starvation wages, unduly long hours and child labor. The prime objective of the so-called business statesmanship, which urged relaxation of our anti-trust laws, has been to limit, abridge and circumscribe price freedom or private contract, by nearly every direct and indirect restraint which human ingenuity could devise. Beyond question our codes tend to foster monopoly and monopolistic practices; and they harass and oppress small enterprise through the economic tyranny of trade majorities. We have largely removed the price making process from the "collective wisdom, error, judgment and mistakes of a free market" and we have placed upon government the impossible task of protective intervention at the crucial points of competition on a million business fronts. If we persist in price fixing, our benign co-operation must be displaced ultimately by a malign paternalism which will arbitrate the economic destiny of all private enterprise.

It is probably not a mere coincidence that the decline in industrial production in 1934 closely followed the practical completion of codification. The plain fact is that our Codes have become complicated mechanisms for artificial, arbitrary and capricious price controls. They have increased price disparities and set up in the business structure a new series of stresses and strains which threaten economic equilibrium. They shackle industry and trade at a time when credit is super-abundant and when deferred demand for the products of industry, due to the depression, is at the highest peak in our business history. They have raised prices, retarded physical production and delayed improvement in employment conditions. We may well paraphrase Rousseau and say: "American enterprise was born free; and everywhere it is in chains."

In all this price fixing experimentation under these Codes, the simple fundamentals of competitive price making have been ignored. The economist defines price as exchange value expressed in terms of money. In other words, it is the monetary expression of the meeting point of supply and demand. We may of course change the monetary yardstick, but that action does not solve the fundamental problem. We should know that unless we can control the supply of and the demand for goods and services, all efforts to fix and control prices are grave economic blunders. This is not esoteric dogma, unless the plain truth is esoteric. More than a century ago, Pelatiah Webster in his Political Essays, said:

> "It is not possible to form a limitation of prices which shall be just and therefore the whole scheme necessarily implies injustice * * * It is not more absurd to limit the precise height to which a ship shall be fixed at a wharf, where the tide is constantly ebbing and flowing. A great force will be required to keep the ship from rising or falling with the tide, and a mighty little use to pay for the trouble; besides the probability of more severe damage which the ship must incur by the application of the necessary force * * *"

By all the artificial price control methods found in the majority of over 600 Codes, prices have been raised, but at the same time, demand over which we have no control, has been choked. These devices are doomed to economic failure because they can operate only to foster special privilege, destroy initiative, and the opportunity for private profit. We cannot safely grant such power to Code groups because, in effect, it is the grant of a power to control prices. Our so-called business statesmanship has created a system which if not promptly abandoned, must ultimately

compel complete governmental control of private business. When that happens, Constitutional Government, as we have known it, will cease to exist.

IN CONCLUSION.

The final decree should be reversed, and the case remitted to the Court below with instructions to grant the relief prayed for by the appellant in its bill of complaint.

Respectfully submitted,

S. FREDERICK PLACER,
Attorney and Solicitor for Appellant.

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CHARLES ELMORE CRO

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES CO. INC.,

Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,

Defendant-Appellee.

APPELLANT'S BRIEF ON JURISDICTION.

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MELVIN L. LEVITT,
On the Brief.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES CO. INC.,
Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,
Defendant-Appellee.

APPELLANT'S BRIEF ON JURISDICTION.

Statement of the Case.

This case is before this Honorable Court on a direct appeal by the complainant-appellant from a decree of a specially constituted statutory Court dismissing its Bill of Complaint against the appellee, the District Attorney of New York County. By this action, the appellant seeks to enjoin the said District Attorney from the enforcement of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, under a New York State statute (Chapter 781 of the Laws of 1933) (R. 33).

Probable jurisdiction was noted on December 10th, 1934, and the case argued before this honorable Court on March 11th, 1935. During the course of the argument, this honorable Court raised the question of jurisdiction. In view of the fact that neither of the parties had briefed the

question of jurisdiction of the Statutory Court under Section 266 of the Judicial Code (United States Code, Title 28, Section 380), this honorable Court requested the submission of briefs upon the following two specific questions:

(a) Whether or not equitable jurisdiction existed for the Statutory Court to entertain the suit; and

(b) Whether or not the District Attorney appellee is a state officer within the meaning and purview of Section 266 of the Judicial Code.

The argument was thereupon continued indefinitely subject to the receipt by this honorable Court of the respective briefs of the parties.

The proceedings in the Court below are sufficiently set forth in the main briefs of the appellant and appellee, as well as in the supplemental briefs of the appellee and the Attorney General, and by reason thereof, require no repetition.

POINT I.

Equity jurisdiction of the cause of action alleged in the Bill of Complaint was properly invoked by the appellant, and the statutory court sitting as a court of equity properly entertained the suit.

By this action, appellant seeks to restrain the appellee, the District Attorney of New York County, State of New York, from criminally prosecuting the appellant under an unconstitutional state statute alleged by the appellant to be in contravention of the Fourteenth Amendment to the Federal Constitution as well as violative of the New York State Constitution, the appellee having openly and publicly

proclaimed such threats to criminally prosecute the appellant and such prosecutions, while not actually pending, were imminent (R. 11, 12; R. Supp. 15, 16).

It is the well settled rule that equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential to avoid multiplicity of suits and criminal prosecutions and also in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable. In such a case a person, who as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings either civil or criminal to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity. *Terrace* v. *Thompson*, 263 U. S. 197; *Truax* v. *Raich*, 239 U. S. 33; *Tyson* v. *Banton*, 273 U. S. 418; *Packard* v. *Banton*, 264 U. S. 140; *Ex Parte Young*, 209 U. S. 123; *Adams* v. *Tanner*, 244 U. S. 590; *Cline* v. *Frink Dairy*, 274 U. S. 445; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497.

Analysis of Cited Cases.

In *Tyson* v. *Banton*, *supra*, this Court sustained the jurisdiction of the lower statutory court and granted an injunction restraining the District Attorney of New York County and the Attorney General of the State of New York, from enforcing, as against the appellant Tyson, the provisions of a New York State statute which fixed the maximum resale prices of theatre tickets. The Bill of Complaint in the cited case alleged that the terms of the statute were so drastic and the penalties for its violation so great, (imprisonment for one year or a fine of $250 or both) that the appellant could not resell any ticket or evidence of

the right of entry at a price beyond that fixed by the statute even for the purpose of testing the validity of the state law. The appellant further alleged that it would be compelled to submit to the statute whether valid or invalid, unless the suit be entertained, in which event, it would be deprived of its liberty and property without due process of law, and be denied the equal protection of the law in contravention of the Fourteenth Amendment to the Federal Constitution.

Under the statute involved in this latter case, the resale of every ticket constituted a separate crime with recurring penalties of fine and imprisonment. In order to prevent the multiplicity of suits and criminal prosecutions, and to safeguard the personal and property rights of the appellant, the deprivation of which was threatened under this unconstitutional state statute, equity jurisdiction was invoked and sustained by this Court which stated:

> "Following the rule frequently announced by this Court that 'equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments when the prevention of such prosecution is essential to the safeguarding of rights of property' we sustain the jurisdiction of the District Court."

In *Hygrade Provision Co.* v. *Sherman* (*supra*) a New York State statute prohibited the offering for sale or sale of meat products without specific designation as to whether or not the meat was "kosher" or "non-kosher", the statute making it a misdemeanor for any violation of the said State statute. The appellant Hygrade Provision Co. had never been prosecuted for a violation of the statute attacked as unconstitutional nor had it ever been specifically threatened with such prosecution. The Bill of Complaint in that case merely alleged a general threat that all vio-

lators of the statute would be prosecuted and concluded with the allegation that in the event of such prosecution, irreparable injury to its business, property, good will and reputation would result.

This Court sustained the equitable jurisdiction invoked under the exception to the general rule hereinabove quoted, namely, that a court of equity will interfere to prevent criminal prosecutions under an unconstitutional statute when that is necessary to effectually protect property rights. In this latter case, the Bill disclosed a doubtful jurisdictional question, "but upon a liberal view of the decisions of this Court (see *Kennington* v. *Palmer*, 255 U. S. 100; 65 L. Ed. 528; 41 Sup. Ct. Rep. 303, and cases referred to in footnote)" this Court concluded that on the decisions heretofore rendered, equitable jurisdiction was properly invoked if the statute under review was in fact unconstitutional.

In *Packard* v. *Banton, supra,* the appellant sought to enjoin the enforcement of a New York State statute which made it a misdemeanor to operate a motor vehicle for hire without having furnished a personal or surety bond in the sum of $2,500 to secure the payment of any judgment recovered against any owner of such hired motor vehicle by reason of death or injury caused in the operation of such motor vehicle.

The appellant averred that the appellees, the District Attorney of New York County, and the Attorney General, threatened to prosecute the appellant for his failure to comply with the said provisions of the New York State statute, and that they would proceed to prosecute him unless he complied with the said law.

While the case presented no more than the possibility of a *single* prosecution for the failure to comply with the terms of the State statute, and while the appellees urged upon

this Court that the appellant had an adequate remedy at law, this Court again invoked the exception to the general rule, sustained equitable jurisdiction and proceeded to the determination of the validity of the state statute upon the merits.

In *Terrace* v. *Thompson, supra,* this Court had occasion to review the many decisions dealing with equitable jurisdiction to restrain threatened criminal prosecutions. The complainant in this case sought to restrain the District Attorney of the State of Washington from enforcing a State statute forbidding aliens to own and hold real estate. The complainant sought to lease certain lands to an alien, but was threatened by the Attorney General with criminal prosecution in the event that such lease was consummated.

In opposing the jurisdiction of equity to entertain the suit, the Attorney General argued that an adequate remedy at law existed. His contentions were based upon two propositions, (1) that

> "The validity of the law might be determined in proceedings to declare a forfeiture of the property to the state"

or (2)

> "in criminal proceedings to punish the owners."

This Court overruled both contentions and entertained jurisdiction of the suit on the ground that the complainant's remedy was in equity for the legal remedy was not

> "as complete, practical and efficient as that which equity could afford."

In part, the Court said:

> "If, as claimed, the state act is repugnant to the due process and equal protection clauses of the 14th Amendment, then its enforcement will deprive the

owners of their right to lease their land to Kukstsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as complete, efficient or adequate as the remedy in equity. And assuming, as suggested by the Attorney General, that, after the making of the lease, the validity of the law might be determined in proceedings to declare a forfeiture to the property to the State, or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment, and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join in violating the terms of the enactment and take the risk of forfeiture * * *. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the Attorney General to enforce the punishments and forfeiture prescribed prevents each from dealing with the other. *Truax* v. *Raich*, 239 U. S. 33. *They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complainant presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution.*" (Italics ours.)

In *Truax* v. *Raich* (*supra*), the complainant sought to restrain the Attorney General of the State of Arizona from

prosecuting the complainant unless he complied with the State law providing for the employment of at least 80% native-born citizens of the United States or qualified electors. Averring that there was no adequate remedy at law, the bill sought a decree declaring the act to be unconstitutional and restraining action thereunder. After the bill was filed, an injunction pendente lite was sought. After notice of this application, the complainant *was arrested* for violation of the act upon a complaint prepared by one of the assistants in the office of the County Attorney, and it appeared that by reason of the determination of the officers to enforce the act, there was danger of the complainant's immediate discharge from employment. The District Judge accordingly granted a temporary restraining order.

The defendants sought to dismiss the appeal upon the grounds (1) that the suit was against the State of Arizona without its consent; (2) that it was to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties and that the complainant was not entitled to sue for the relief asked.

The application for an interlocutory injunction and the motion to dismiss was then heard before three judges as required by Section 266 of the Judicial Code. The motion to dismiss was denied, and an interlocutory injunction restraining the Attorney General, County Attorney and the enforcing officers from enforcing the act against the complainant, granted.

Equitable jurisdiction was upheld by this Court, the opinion reading in part as follows:

> "As the appeal is framed upon the theory that the act is unconstitutional and that the defendants,

> who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the State. Whatever doubt existed in this class of cases was removed by the decision in *Ex Parte Young*, 209 U. S. 123, 159, 161, 52 L. Ed. 714, 727, 729, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cases 764, which has repeatedly been followed."

citing cases. And further:

> "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (*re Sawyer* 124 U. S. 200, 210) a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights and property."

citing cases. And still further:

> "It is also entirely clear that unless enforcement of the act is restrained, the complainants will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."

Perhaps the leading case on the subject is *Ex Parte Young* (*supra*), where a great number of the authorities were collated, distinguished and reviewed. This decision exerted an enormous influence in the furtherance of the exercise of the jurisdiction of federal courts to grant equitable relief against unconstitutional penalties and

prosecutions threatened under state authority. This Court has since without variation, announced and applied it in numerous cases. (*Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278 (1913); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Cuyahoga* v. *Akron*, 240 U. S. 462 (1916); *Greene* v. *Louisville Ry.*, 244 U. S. 499 (1917); *Cavanaugh* v. *Looney*, 248 U. S. 453 (1919); *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426 (1926); *Binford* v. *McLeaish & Co.*, 284 U. S. 598 (1932); *Sproles* v. *Binford*, 286 U. S. 374 (1932); *Mosher* v. *Phoenix*, 287 U. S. 29 (1932); *Sterling* v. *Constantin*, 287 U. S. 378 (1932).

In *Adams* v. *Tanner* (*supra*), the State statute prohibited employment agencies from accepting fees for securing positions for applicants of employment. The penalty involved for violation of such statute was a fine not to exceed $100 and imprisonment not to exceed thirty days for *each* violation. Equity jurisdiction was invoked and sustained to prevent a multiplicity of prosecutions by reason of possible recurring penalties for each violation of the Act and to safeguard the rights of the complainant to continue in its lawful business as an employment agency.

The appellant respectfully submits that the facts in the case at bar fall clearly and unequivocally within the decisions of this Court cited above and respectfully contends that an analysis of the facts herein, demonstrates the correctness of the statutory Court's entertainment of equitable jurisdiction.

The Facts in the Case at Bar.

The appellant, a New York corporation, has been engaged in the business and trade of buying and selling motor vehicles, motor vehicle parts and accessories, and

the general service and repair of motor vehicles, and except for the manufacture of automobiles and parts, is engaged generally in the motor vehicle business (R. 4). At the time of the commencement of this action, it had been engaged in such business for upwards of eleven years having been incorporated in the year 1923. Together with its affiliate, Spielman-Chevrolet Corporation, it conducts its business at five branches in the Boroughs of Manhattan and Brooklyn, City and State of New York (R. 4), and in such conduct and management of its business, it employs eighty employees. In the establishment of the appellant's business, it has expended vast and considerable sums of money, time and effort and has developed a good will amongst its customers and patrons of immeasurable value (R. 5).

Prior to the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade promulgated under the National Industrial Recovery Act and having its apparent sanction as law of the State of New York by virtue of Chapter 781 of the Laws of 1933 of the State of New York, the appellant transacted its business within the dictates of its discretion, based upon sound, economic business sense. In its sales of new automobiles, trade-ins constituted 85% of its sales. The Bill alleges (R. 11) that prior to the adoption of the provisions of Article IV of the Motor Vehicle Retailing Code, by allowing its customers and patrons actual, fair and honest values for used car trade-ins, on the purchase of new cars, irrespective of the maximum allowances now fixed under the Code provisions referred to, the complainant made a fair return and profit on its investment.

The Bill further alleges that while the appellant was thus engaged in its lawful and legal private business, the defendant, as District Attorney of New York County, made an application to a Magistrate of the City of New York in the name of the People of the State of New York,

for the issuance by such Magistrate of a Summons directing and requiring the complainant to appear before said Magistrate to the end that an investigation be made of an alleged complaint against the complainant for alleged and purported violation of the provisions of Article IV of the Motor Vehicle Retailing Code, and that upon such investigation, an information be drawn against the appellant for alleged violation of the provisions of the Motor Vehicle Retailing Code, referred to.

This threat to criminally prosecute the appellant was based upon the provisions of Chapter 781 of the Laws of 1933 of the State of New York, which provides that any violation of any of the provisions of any Code of Fair Competition filed with the Secretary of State of New York pursuant to the said Chapter, is a misdemeanor punishable by $500. fine for each day of violation, each day constituting a separate offense.

In the face of appellee's threats to criminally prosecute the appellant, it filed its Bill of Complaint in the District Court, Southern District of New York, challenging the constitutionality of the action of the appellee and the constitutionality of the State statute under the Federal Constitution, to wit, the Fourteenth Amendment thereof.

The bill asserts that the terms of the Statute are so drastic and the penalty for violation so severe, that in the event that the appellant refuses to comply with said Statute and in the event of conviction for such purported violations, it will be subject to the heavy penalties prescribed by Chapter 781 of the Laws of 1933, which said penalties, if appellant were compelled to pay, would be a deprivation of its rights, liberty, property and immunities without due process of law (R. 13).

In the event that the appellant abides by the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, then and in that event, it is

compelled, by its apparent sanction as law, pursuant to the provisions of Chapter 781 of the Laws of 1933, to charge arbitrary and unreasonable prices on trade-ins, by reason thereof, appellant could not continue in its lawful business, in which alternative event it will likewise be deprived of its rights, property, privileges and immunities without due process of law (R. 13).

In this connection, it may be well to point out that not only does Chapter 781 of the Laws of 1933 make it a misdemeanor for one to violate the provisions of any Code with the consequent penalty of a maximum $500 fine, but by the provisions of Sections 484 and 718 of the Code of Criminal Procedure of the State of New York, a defendant may also be directed to be imprisoned until such fine is satisfied, the imprisonment being stated not to exceed one day for every dollar of the fine.*

By virtue of the threats of the appellee to criminally prosecute the appellant for alleged violations of the statute, appellant was faced not only with the possibility of being fined out of business or its business destroyed by the

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* "Sec. 484. Judgment to Pay Fine.

The power to remit a fine imposed by any court, whether of record or not of record, imposed for any criminal offense whatever, shall only be exercised as in this section provided. Any court of record, except an inferior court of local jurisdiction, which has imposed a fine for any criminal offense, or the presiding judge thereof, or any judge authorized to preside therein, shall have power in his discretion, on five days' notice to the district attorney of the county in which such fine was imposed, to remit such fine, or any portion thereof. In case of a fine imposed by a court not of record or by any inferior court of local jurisdiction for any criminal offense whatever, the county judge of the county in which the fine was imposed, and in case of a fine imposed by such a court in the city of New York, the court of general sessions, or any judge thereof, upon five days notice to the district attorney of the county in which such fine was imposed, shall have the same power. A judgment that the defendant pay a fine may also direct that he be imprisoned, which cannot exceed one day for every one dollar of the fine. (Amended by L. 1886, ch. 434.)"

"Sec. 718. Judgment of Imprisonment until Fine be Paid; Extent of Imprisonment; Probation; Restitution.

A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied; specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine. The court may require a defendant to pay a fine or restitution, or to make reparation, as provided in subdivision two of section four hundred and eight-three. (Amended by L. 1910, ch. 600.)"

statute attacked, if unconstitutional as alleged, but it was also liable through its officers and employees to imprisonment not to exceed one day for every dollar of fine.*

The Bill of Complaint proceeds further to allege that unless an injunction be granted temporarily and permanently, the appellant would suffer irreparable damage (R. 13), and that it had no adequate remedy at law (R. 14).

The Statutory Court found as facts that the appellee openly and publicly proclaimed to the complainant that he was prepared and ready, through his office as District Attorney of the County of New York, State of New York, to institute criminal prosecutions against the complainant herein for alleged violations of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly the violation of Article IV, Subdivision A, Paragraph 1, and Article IV, Subdivision B, Paragraph 2 (R. Supp. 15).

It found further that "it was the duty of the defendant to prosecute in an official capacity all violations of law and public offenses (R. Supp. 14), and that but for the adoption and approval of the Code of Fair Competition for the Motor Vehicle Retailing Trade, and but for the provision therein contained establishing the maximum trade-in allowance in the Official Guide Book, and but for the fact that Chapter 781 of the Laws of 1933 of the State

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* Such has been the construction of prior statutes which decreed similar punishment (*Chapman* v. *Sclover*, 225 N. Y. 417; 122 N. E. 206) and the construction of Chapter 781 of the Laws of 1933 involved in the case at bar. (*People* v. *Harris*, 153 Misc. Rep. 300; 274 N. Y. Supp. 171.)

In *Chapman* v. *Sclover* (*supra*), Mr. Justice Cardozo stated at page 421:

> "The state when it punishes misdemeanors by fine, is not confined to the dubious remedy of a civil action for a penalty. (Code of Civil Procedure, Section 1962.) The offender who refuses to pay (the fine) may be imprisoned until the fine is satisfied, subject to the condition that the imprisonment may not exceed one day for every dollar of the fine (citing authorities). The punishment is not solely the liability for a debt. The punishment includes the consequences that follow upon default."

of New York fixed a penalty not exceeding $500 fine for each violation of the aforesaid provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, the complainant could continue to offer trade-in allowances in the sale of new cars, without restriction except by its own sense of discretion." (R. Supp. 16).

It found as a fact that the appellant is one of the largest motor vehicle retailers in the City of New York operating four branches in addition to its principal place of business, and employing approximately eighty employees (R. Supp. 13 and 14), and that in the establishment and conduct of its business, it had invested and expended in both physical assets and in the establishment and retention of intangible good will, vast and considerable sums of money, which has resulted in the development of patronage of great monetary value (R. Supp. 38).

Finally, it found that the appellant had no adequate remedy at law (R. Supp. 38) and could only have relief in a Court of equity.

In view of the allegations of the Bill of Complaint supported by the Findings of Fact of the Statutory Court, and in view of the similarity of the factual situation presented in the case at bar with the factual situations appearing in *Tyson* v. *Banton* (*supra*), *Adams* v. *Tanner* (*supra*), *Hygrade Provision Co.* v. *Sherman* (*supra*) and *Ex Parte Young* (*supra*), the appellant respectfully submits that within the authorities cited, equity jurisdiction was justifiably invoked and properly sustained by the lower Court.

Appellant submits further however that the facts in the case at bar present even a stronger case for equitable relief than some of the cases referred to above, particularly the cases of *Packard* v. *Banton* (*supra*) and *Hygrade Provision Co.* v. *Sherman* (*supra*).

In the *Packard* case there were no recurring penalties. The appellant was either compelled to insure his motor

vehicle or be subject to a single prosecution for the failure to comply with the statute. This Court held, nevertheless, that sufficient facts existed for equitable jurisdiction.

Similarly, in *Terrace* v. *Thompson* (*supra*) and in *Traux* v. *Raich* (*supra*), single transactions and prosecutions were involved, yet equity jurisdiction was sustained by this Court.

In the case at bar however, we find the following conditions to exist. Each acceptance by the appellant of a traded in automobile above the maximum price fixed by the provisions of the Code, constitutes a separate and distinct offense and is punishable by a maximum fine of $500 and imprisonment not to exceed one day for each dollar of fine (N. Y. Code of Criminal Procedure, Sec. 484 and Sec. 718; *Chapman* v. *Sclorer* (*supra*); *People* v. *Harris* (*supra*)). In the normal course of one day's business, the appellant might accept ten traded in automobiles on the sale of new cars and grant ten allowances on the traded in automobiles above the maximum Code Provisions. In such instance, for a single day's business, the appellant would be subject to ten prosecutions or a daily maximum fine, if convicted, of $5,000 with a maximum of 5,000 days (over 13 years) imprisonment—*this, by reason of one day's violation of the provisions of the Code.* If, in the course of one week's business, the appellant consummated sixty sales of new cars upon the trade-in plan and granted allowances on such trade-ins of more than the maximum prices established by the Code, it would be subject to 60 distinct penalties amounting to a maximum fine of $30,000 and imprisonment of its officers and employees for well nigh 70 years.

Faced with this possibility and the multiplicity of prosecutions, the appellant's recourse was only to a court of equity, and the only appropriate relief available to it to test the constitutionality of its state's statute was the remedy pursued—injunction.

The appellant, in the institution of this action, followed closely the decision of this Court in *Ex parte Young* for the facts with respect to punishment are quite parallel. In *Ex parte Young,* this Court stated:

> "For disobedience to the Freight Act, the officers, directors, agents and employees of the company are made guilty of a misdemeanor, and upon conviction, each may be punished by imprisonment in the County Jail for a period not exceeding 90 days. Each violation would be a separate offense and further might result in imprisonment of the various agents of the company who would dare disobey, for a term of 90 days each for each offense.
>
> Disobedience to the Passenger Rate Act, renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years or both fine and imprisonment. The sale of each ticket above the price permitted by the Act, would be a violation thereof. It would be difficult; if not impossible, for the company to obtain officers, agents or employes willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission.
>
> The company, in order to test the validity of the Acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation, must be to preclude a resort to the courts, either state or federal, for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the Acts or orders at the risk of such fines and penalties being imposed upon them in case the Court should decide that the law was valid.

> The result would be a denial of any hearing to the company.
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> * * * * * * *
>
> It may be further stated that when the penalties for disobedience are by fine so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms, prohibited the company from seeking judicial construction of laws which deeply affect its rights."

There appears to be very little difference, if any at all, between the case of *Adams* v. *Tanner* (*supra*) and the case at bar. In the cited case, this Court held that the right to conduct an employment agency is a property right and injunction a proper remedy to prevent the destruction of such business by an unconstitutional statute. The right to engage in the motor vehicle business is a right of property and the stabilizing limitations of the Fourteenth Amendment safeguard its annihilation by unconstitutional statutes.

Similarly, therefore, in this case, injunction is the proper remedy.

Analysis of Attorney General's Argument.

In the brief submitted by the Attorney General, on the question of jurisdiction it is asserted under "Point I" that a Court of Equity has no jurisdiction to enjoin a "pending prosecution". With this general statement of law appellant takes no issue. The facts in the case at bar however, present a case where no prosecution was pending, but threats and proclamations of the intent to criminally prosecute the appellant by reason of alleged violations of the State statute and the imminency of such criminal prosecutions.

While the Attorney General asserts in "Point I" of his memorandum that the statutory Court "should not have assumed jurisdiction to enjoin the pending prosecution", he nevertheless admits on page 10 of his brief that *"no prosecution had been commenced"*. It is therefore apparent that in the case at bar, equity jurisdiction was not invoked to restrain a "pending prosecution", but threatened criminal prosecutions. This is borne out not only by the allegations of the Bill of Complaint (R. 11 and 12, paragraph 23 of Bill of Complaint), but also by the Finding of Fact of the statutory Court (R. Supp. 15, Finding of Fact "10th").

The statement on page 10 of the Attorney General's brief that "there was no threat to continue prosecutions" is not supported in the record or in the Findings of Fact herein.

The Attorney General asserts further at page 4 of his brief that a single prosecution could determine the validity of the state statute attacked and in that fashion, permit the state's highest court to determine the issues upon such prosecution. This argument is not new. It was asserted by the Attorney General in the case of *Ex parte Young* (*supra*). The answer to that proposition was succinctly stated by this Court in the case mentioned, as follows:

> "It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity therefore has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the Act is to disobey it at least once after which the company might obey the Act pending subsequent proceedings to test its validity. But in the event of a single violation, the prosecutor might not avail himself of the opportunity to make the test as obedience to the law was thereafter continued and he might think it unnecessary to start an inquiry. If however, he should do so while the company was thereafter

> obeying the law, several years might elapse before there was a final determination of the question and if it could be determined that the law was invalid, the property of the company would have been taken during that time without due process of law and there would be no possibility of its recovery."

While admitting that the state statute is attacked upon the ground that it violates the Fifth and Fourteenth Amendments to the Constitution, the Attorney General asserts on Page 6 of his memorandum, that such attack is secondary and is only incidental to the attack made upon the statute under the State Constitution. He urges further that the appellant should be compelled to resort to the state courts to determine the constitutionality of the statute.

The answer to that argument is contained in the language of this Court in *Terrace* v. *Thompson* (*supra*) wherein the following appears:

> "They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complainant presents a case in which equitable relief may be had if the law complained of is shown to be in contravention of the Federal Constitution."

It has been held by this Court that where a federal constitutional question is raised, the Federal Court has jurisdiction and is authorized to determine all the questions in the case, local as well as Federal, and that in the exercise of such power is competent to determine the constitutionality of the statute assailed as being repugnant to the state Constitution as well as the Federal Constitution.

Louisville & N. R. Co. v. *Garrett*, 231 U. S. 298;
Chicago & Great Western R. R. Co. v. *Kendall*,
45 Sup. Ct. Reporter 55 (Nov. 12th, 1924).

In *Louisville & N. R. Co.* v. *Garret* (*supra*) this Court stated:

> "Because of the Federal questions raised by the bill, the circuit court had jurisdiction and was authorized to determine all the questions in the case, local as well as federal. *Siler* v. *Louisville & N. R. Co.* 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 Sup. Ct. Rep. 451. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges and authorizes an appeal to this court. 36 Stat. at L. 557, Chap. 390. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its 'unconstitutionality.' The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds, and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case, and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. *The local questions arising under the state constitution and statutes were therefore before the circuit court and the bill brings them here. They may be first considered.*". (Italics ours.)

The most practical and most adequate method to determine the most serious constitutional questions of this age, was resorted to in this case in order that a final and decisive determination be secured as expeditiously as

possible. When graye constitutional questions of state statutes are involved, Section 266 of the Judicial Code (U. S. Code, Title 28, Section 380) is by far the most efficient and direct avenue for their determination.

The Attorney General cites at page 9 of his memorandum the case of *Cline* v. *Frink Dairy Co.*, 274 U. S. 445. In that case, while this Court declined to enjoin a *pending* prosecution, it nevertheless enjoined threatened prosecutions not then pending, and is authority for the contentions urged by the appellant herein.

The Bill of Complaint in the *Cline* case alleged amongst other things, that the individual plaintiffs, experienced dairymen, by painstaking effort, fair dealing and careful management, have gained thousands of customers and a well established trade, and that their companies, in addition to their tangible property and assets, have good wills of great value. It was therein charged that the Act, the enforcement of which was sought to be restrained was unconstitutional in that it deprived the dairymen of their property rights.

Equity jurisdiction was sustained and an injunction granted to restrain threatened prosecutions under the exception to the general rule, the statute being declared unconstitutional, while pending criminal prosecutions could not, under the general rule, be enjoined.

When we compare the allegations of the Bill of Complaint in the case at bar with the facts in the *Cline* case, we find parallel allegations, to wit, that the complainant in the case at bar "has expended vast and considerable sums of money, time and effort and has developed a good will amongst its customers and patrons of immeasurable value" (R. 5; R. Supp. 38, Finding 92nd).

Were the complainant to defy the criminal authorities and continually violate the provisions of Article IV of

the Code of Fair Competition for the Motor Vehicle Retailing Code, it would subject itself to the severe penalties provided by the statute. On the other hand, should it comply with the statute under the compulsion of the purported validity of the Act, then it would be deprived of its property rights under its claim that the state statute arbitrarily, unreasonably and oppressively interferes with the lawful conduct of its business and deprives it of its rights to consummate its sales at such prices as its discretion dictates, based upon sound business policy.

In the latter instance appellant asserts it will be compelled to submit to the statute even if invalid, unless this suit be entertained and thereby will be deprived of its property and liberty without due process of law and denied the equal protection of the law in contravention of the 14th Amendment to the Federal Constitution.

The appellant cannot, in the face of the invalidity of the statute, comply therewith, and see its business destroyed, nor fail to comply and see itself fined out of business unless a court of equity entertained its suit for the determination of the validity and constitutionality of the statute involved.

Ex parte Young, supra.

For the foregoing reasons, it is respectfully urged that the appellant properly resorted to a Court of equity, and that the statutory Court did not err in sustaining equitable jurisdiction.

POINT II.

The appellee is an officer of the State within the purview of Section 266 of the Judicial Code (United States Code, Title 28, Section 380).

The appellee's brief herein has painstakingly and adequately discussed the position of the appellee District Attorney as a state officer within the purview of Section 266 of the Judicial Code, and has amply demonstrated by historical reference as well as by the decisions of the Courts of the State of New York, his position as an officer of the state. We need not, therefore, unduly lengthen this memorandum with the repetition of the arguments asserted in the appellee's brief.

Diligent research on this legal question has failed to unearth any precedents which are clearly decisive of the issue. This Court has not had occasion to pass upon this problem in any of the cases before it. In at least two reported cases, however, this Court entertained suits against a County Attorney and a County Prosecuting Attorney under Section 266 of the Judicial Code and determined them on the merits (*Noble* v. *Douglas*, 261 U. S. 165 (a County Prosecuting Attorney); *Gulf Fisheries Co.* v. *McInerney*, 276 U. S. 124 (County Attorney)).

The question as to whether or not the respective County Prosecuting Attorney and County Attorney were state officers within the purview of Section 266 of the Judicial Code, was not expressly raised in the cases cited.

In addition to the case of *Fellows* v. *Mayer*, 8 Hun 484, cited to this Court on the argument of the appeal herein, and referred to in the appellee's supplemental Brief, we

may cite three additional cases arising in other jurisdictions wherein the question was precisely raised and passed upon.

State v. *Romero,* 125 Pacific (N. Mex.) 617;
Griffin v. *Rhoton,* 85 Ark. 89, 107 S. W. 380;
Spear v. *Wood,* 128 Ark. 123, 193 S. W. 785.

The case of *State* v. *Romero* (*supra*) was a mandamus action commenced by one, Ward, a District Attorney, against Romero the County Treasurer of San Miguel County, to compel the County Treasurer to pay him a certain fee for services rendered to the County, the District Attorney having first procured the allowance by the Board of County Commissioners of San Miguel County. Ward was the District Attorney of the Fourth Judicial District in New Mexico, the state being divided into judicial districts. The lower Court found for the relator District Attorney. The question for determination before the Appellate Court was whether or not the District Attorney was a County officer so that he could be compensated by the county or whether or not he was a state officer. The Appellate Court reversed the peremptory writ granted to the District Attorney and held that the District Attorney Ward, was not a County officer, but a state officer, within the purview of the New Mexico Constitution. The Court said in part:

> "He was made the law officer of the territory and the fact that he may have performed his duty in prosecuting and defending suits within defined limits, did not make him any less the representative of the territory. He was an agent provided for by the Legislature and appointed by the Governor to perform the high function of the state in the preservation of the public peace and the protection of life and property; he prosecuted in the name of the people of the territory, not of any county or district;

> he was the advocate of all the people of the territory and did not represent it in the enforcement of law and did not represent one county or one district. He was not required to reside at the time of appointment within the district for which he was appointed. While it was true he was the law officer of the various counties within his district, yet his duty was but an incident of the office, or the employment of a state agent for a purely local purpose, and did not change the nature of his office."

The Supreme Court of Arkansas in the case of *Griffin* v. *Rhoton* (*supra*), in considering the question as to whether or not the District Attorney was a state officer within the meaning of a constitutional provision which provided that no officer of the State should receive for salary fees amounting to more than $5,000 net profit per annum, said:

> "This court is of the opinion that the constitutional provision applies to the office of Prosecuting Attorney. It is a state office within the meaning of this provision. A prosecuting attorney is, according to the requirements of the Constitution, elected by the qualified electors of the Circuit for which he is to serve and must be a resident of that Circuit. Nevertheless, he is elected as an officer of the state. He draws a salary from the state as one of its officers, which is provided for in a section of the Constitution grouping together the other state officers, and he is the representative of the state in all criminal prosecutions in his Circuit. It is true that he is by statute made the representative of each county in his Circuit in all litigation in which the counties are concerned. Some of the emoluments of his office come from the counties; the statute providing in certain contingencies that the counties shall pay the cost of criminal prosecution. Still he is an officer of

the state and represents the several counties in his district only as political subdivisions of the state."

* * * * * * *

"From what we have said, it follows that the District Attorney under the Constitution is a state officer; * * *"

In *Spear* v. *Wood* (*supra*), the Prosecuting Attorney Spear was indicted for criminal misconduct. The Circuit Court sought to suspend him from office during the pendency of the indictment. Spear then sought a writ of prohibition against the Circuit Court from entering an order suspending him from office during the pendency of the indictment. He alleged that he was a state officer and that the Circuit Court was vested with power only to remove a County or Township officer, and as such state officer, he was therefore not subject to the Circuit Court jurisdiction. The Arkansas Constitution provided for the removal of state officers by impeachment before its Senate with proceedings being initiated in its House of Representatives or by the Governor upon the joint address of two-thirds of the members elected to each house of the General Assembly.

The Court on appeal held that Spear, the Prosecuting Attorney, while a local officer, was nevertheless a state officer, and that therefore, the Circuit Court, although vested with power to remove county or township officers, had no jurisdiction to remove the Prosecuting Attorney in view of his position as a state officer.

The appellee in the case at bar while performing his duty in prosecuting criminally within defined territorial limits, nevertheless in such cases, is acting as agent of the state and as such, is a state officer rather than a local officer.

Prosecutions in New York County as well as any other counties of the State of New York, are brought in the

name of the People of the State of New York at large and not in the name of the people of a particular county or locality. The District Attorney is the agent and officer of the People of the State, and not of the people of a particular county, and the fact that he performs his duty in prosecuting within defined limits, does not make him any less the representative of the People of the State of New York at large. His duties do not require him to enforce merely local laws, but to enforce the laws of the State.

The Attorney General of the State of New York is duty bound under Section 62 of the Executive Law of the State of New York to "prosecute and defend all actions and proceedings in which the state is interested". He is the State's attorney for the purpose of prosecuting actions wherein the People of the State of New York is the complainant or plaintiff as the case may be, and the representative of the State in any action wherein the State is a defendant.

It has been repeatedly held that actions brought under Section 266 of the Judicial Code to restrain the enforcement of unconstitutional state statutes, are not actions against the state as such (*Ex Parte Young* (*supra*) and cases therein cited and discussed).

In the light of these decisions, the State of New York is not a party defendant in this suit, and therefore, the Attorney General would not be a proper party to this action. Furthermore, the Attorney General of the State of New York is not authorized to prosecute offenses generally and has no jurisdiction under Chapter 781 of the Laws of 1933, the statute herein questioned. This is readily admitted by the Attorney General in his memorandum (p. 8, Attorney General's Memorandum on Jurisdiction).

This being so, the only being specially charged with the duty to enforce the statute, is the defendant-appellee, the District Attorney of New York County.

In making an officer of the state a party defendant in a suit to enjoin the enforcement of an Act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the Act or else it is merely making him a party as a representative of the state and thereby attempting to make the state a party in violation of the Eleventh Amendment to the Federal Constitution.

If it is determined that the District Attorney of New York County is not an officer of the state within the purview of Section 266 of the Judicial Code, we can find no state officer as such, against whom such an action may be instituted in the State of New York to restrain the enforcement of this unconstitutional statute.

The suggestion by the Attorney General that the proper party defendant in this case would be the Secretary of the State of New York, is groundless, for under Chapter 781 of the Laws of 1933, his function is merely ministerial, *i. e.*, to accept for filing Codes of Fair Competition approved by the President of the United States. He is not invested with any duty or discretion under Chapter 781 of the Laws of 1933, or, under the State Constitution, with the power of enforcement of the provisions of this Act, or of any other criminal statute. The officer proceeded against "must have some connection *with the enforcement of the Act*" (*Ex parte Young, supra*). Obviously, the Secretary of State of New York is not such proper party.

If it is to be held that the District Attorney is not a state officer within the purview of Section 266 of the Judicial Code, then he was likewise not a proper party to be enjoined in the cases of *Tyson* v. *Banton* (*supra*), *Packard* v. *Banton* (*supra*) and *Hygrade Provisions Co.* v. *Sherman* (*supra*). The relief granted in *Tyson* v. *Banton* was against both the Attorney General *and* the District Attorney of New York County. If it is to be held, therefore, as asserted by the Attorney General in the case at

bar, that the District Attorney is not a state officer within the purview of Section 266 of the Judicial Code, then he impliedly asserts that this Court erred in granting an injunction in the *Tyson* case, and also erred in *Packard* v. *Banton* and *Hygrade Provisions Co.* v. *Sherman*, in the entertainment of the suits on the merits against state officers.

If the District Attorney of New York County were stricken as a party defendant in *Tyson* v. *Banton* (*supra*), relief against the Attorney General alone would never have sufficed to prevent criminal prosecution in the absence of any duty on the part of the Attorney General to prosecute for the commission of misdemeanors defined by the statute therein. The District Attorney would therefore be free to proceed to criminally prosecute the appellant Tyson.

To remand this case to the District Court and allow a single District Judge to determine the constitutionality of the state statute involved, would be to defeat the intents and purposes of Congress in the enactment of Section 266 of the Judicial Code, which requires a statutory Court of three judges to decide such paramount questions. (*Suncrest Lumber Co.* v. *N. Carolina Pack. Comm.*, 29 Fed. (2nd) 823.)

A liberal construction of Section 266 of the Judicial Code, bearing in mind the purpose and intent of Congress in its enactment, sustains the conclusion of the appellant that the appellee, the District Attorney of New York County, is an officer of the state within its purview, and as such, is a proper party defendant.

The requirements of Section 266 of the Judicial Code (United States Code, Title 28, Section 380), were duly complied with in the manner therein provided. Copies of the Bill of Complaint and Notice of application for a temporary injunction were duly served upon the Governor of

the State of New York and the Attorney General. The Attorney General appeared before the Statutory Court, his appearance was noted (R. 264), and participated in the argument as well as in the filing of briefs.

The Attorney General also entered into the stipulation with respect to the making of Findings of Fact and Conclusions of Law (R. Supp. 4), he participated in all the proceedings in this case and appeared in this action on the argument before this Court. He appeared by virtue of the salutory provisions of Section 266 of the Judicial Code when notice was served upon him and not as claimed "in accordance with the policy and established practice of the Attorney General's office in cases where the constitutional validity of state statutes is attacked" (Attorney General's Brief, p. 12).

This case does not present a situation where a state is given no opportunity to be heard on the merits and to support if possible the constitutionality of the state statute involved. On the contrary, the Attorney General has taken part in every hearing, including the one before this Court.

The Attorney General has now moved before this Court to dismiss the appeal herein on the ground of want of jurisdiction.

The appellant respectfully submits that the Attorney General assumes a most anomalous position. If he does not consider himself a party to this case, although not of record, no authority exists for him to move before this Court to dismiss the present appeal for want of jurisdiction. While appellant cannot doubt the right and duty of this Court to interpose the jurisdictional objection *sua sponte*, such motions however are only available to parties of record.

CONCLUSION.

Appellant respectfully submits by reason of the foregoing, that equitable jurisdiction was properly invoked to restrain the appellee as a state officer within the purview of Section 266 of the Judicial Code, and respectfully prays for a determination of the paramount issues presented by this case on the merits.

Respectfully submitted,

S. FREDERICK PLACER,
ISADORE PAUL,
Attorneys for Appellant.

MELVIN L. LEVITT,
On the Brief.

New York, N. Y., April 4th, 1935.

FILE COPY

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES COMPANY, *Appellant*,

vs.

WILLIAM C. DODGE, District Attorney, *Appellee*.

BRIEF OF APPELLEE.

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March 6, 1935.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES COMPANY, *Appellant*,

vs.

WILLIAM C. DODGE, District Attorney, *Appellee*.

BRIEF OF APPELLEE.

The opinion of the statutory court of three judges (R. 264-273) is reported in 8 Fed. Supp. 437. The case is before this Court on direct appeal of the complainant below pursuant to U. S. Code, Title 28, Section 380 (Judicial Code Section 266). Probable jurisdiction was noted December 10, 1934.

STATEMENT OF THE CASE.

Proceedings in the Lower Court.

The appellant herein filed a bill of complaint (R. 4) in the District Court of the United States for the Southern District of New York against William C. Dodge, the duly

elected District Attorney for the County of New York, seeking to enjoin the enforcement of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade by prosecuting appellant for violation of the fair trade practice provisions contained in Article IV of the Code. This being an attempt to enjoin enforcement of the Code as a regulation under State authority, a statutory court of three judges was convened to hear the application for preliminary injunction. (R. 66.) A motion to dismiss the bill of complaint was filed by the defendant (R. 263). Affidavits in support of (R. 37-66; 140-218) and in opposition to (R. 67-139; 218-263) the motion for preliminary injunction were filed.

After a hearing, the Court rendered an opinion holding that the motion for preliminary injunction should be denied (R. 264-73) and on October 18, 1934, entered an order denying the motion for preliminary injunction and dismissing the bill of complaint (R. 273-74).

Following the order allowing the appeal herein, entered November 13, 1934 (R. 274), the parties stipulated (R. (S) 2) that the hearing on the application for preliminary injunction and on the motion to dismiss the bill of complaint might be considered a final hearing on the merits with the affidavits accepted as the evidence on final hearing (*Hines Trustees v. United States*, 263 U. S. 143) and that findings of fact and conclusions of law be submitted to the statutory court for entry pursuant to Equity Rule 70½, same to be entered *nunc pro tunc* as of a date immediately prior to the final decree. The statutory court entered an order pursuant to the terms of the stipulation (R. (S) 1) and formal findings of fact and conclusions of law were forwarded by the Clerk of the lower court for incorporation with the record on this appeal. The case is now before this Court on an appeal from a decision dismissing the bill of complaint, as on final hearing.

STATUTES AND CODE PROVISIONS INVOLVED.

The statutes involved are:

1. The National Industrial Recovery Act, approved June 16, 1933, c. 90, 48 Stat. 195, U. S. C. Title 15, Section 701.

2. Chapter 781, Laws of 1933 of State of New York, effective August 26, 1933 (R. 33).

Copies of the pertinent sections of these statutes together with certain executive orders are set forth in Appendices A, B, C*. (Vol. 2, pp. 1, 10, 15) The provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade appear in the Record. (R. 19-33.)

These statutes and the codes of fair competition therein contemplated provide for a general regulation of industrial and commercial activity. The National Industrial Recovery Act is entitled "An Act to encourage National Industrial Recovery, to Foster Fair Competition, and to Provide for the Construction of Certain Useful Public Works, and for Other Purposes". Section 1 of the Act contains a declaration of National emergency and a declaration of policy designed to promote increased industrial and commercial activity, to reduce unemployment, eliminate unfair competitive practices and to bring about recovery throughout the Nation. One of the means provided by the Act to accomplish these ends was the provision for the establishment or promulgation of codes of fair competition, which the President was authorized to approve upon the application of a trade association or group representative of such trade or industry, and upon the making of certain findings therein specified including the finding that such code would tend to effectuate the policy of the Act.

Section 3 (b) of the Recovery Act, declared that the provisions of a code so approved should be the standards of fair competition for the trade or industry and that any violation of such standards "in any transaction in or affecting

*The Appendices herein referred to are printed in a separate volume filed herewith and designated Vol. 2.

interstate commerce" should be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act. The several district courts of the United States were vested with jurisdiction in equity to restrain violations of any code so approved and any violation of the provisions of such codes "in any transaction in or affecting interstate or foreign commerce" was made a misdemeanor, punishable by a fine of not more than $500.00 for each offense.

The State Act of New York contained a similar declaration of emergency and a declaration of policy to cooperate in the furtherance of the objects and purposes declared in the Federal statute and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the National Act. It was further provided that codes approved under the National Act might be filed with the Secretary of State of New York and upon such filing the Code should be the standard of fair competition for the particular trade or industry in the State of New York as to transactions intrastate in character. Any violation of the provisions of such a Code as adopted by the State of New York was made a misdemeanor punishable by a fine of not more than $500.00 for each offense and the State courts were vested with jurisdiction to restrain violations of such codes as to intrastate transactions.

Both the Federal and State Acts contain provisions exempting from the provisions of the respective Federal and State Anti-Trust Laws the codes so approved and any actions of persons in complying with the provisions thereof while such codes were in effect (Section 5 of the Federal Act and Section 5 of the State Act). The statutes authorized and encouraged cooperative action by trade and industrial groups of a character previously forbidden by the Anti-Trust Laws.

The State Act was expressly designed to cooperate with

and supplement the Federal Recovery legislation and to provide for uniformity of legislative and administrative policy in the fields of State and Federal regulation.

The Code of Fair Competition for the Motor Vehicle Retailing Trade (R. 16-33) was approved by the President on October 3, 1933, pursuant to Section 3 (a) of the National Industrial Recovery Act. After being so approved, the Code was filed with the Secretary of State of New York (R. 9; R. (S) 14-15) in accordance with the provisions contained in the New York Act. The Code provides for the regulation of Motor Vehicle Retail dealers. Article I of the Code contains the statement of purposes. Article II contains definitions. (The appellant was a dealer engaged in the business of motor vehicle retailing as therein defined.) (R. (S) 13.) Article III contains regulations governing employment of labor including minimum wages and maximum hours. Article IV contains trade regulations including a limitation of the maximum trade-in allowance which a dealer may give in the sale of a new motor vehicle to a customer who trades in a used car in such transaction and the requirement for the maintenance of factory list prices, with a prohibition against discounts, gratuities, commissions or other means of rebating a part of such list price.

The other articles of the Code provide for administrative machinery and contain general provisions required by the Act or by the administrative regulations.

Appellant's attack is directed at the trade practice regulations of Article IV above described. No question of the validity or application of the labor provisions of the Code is here involved.

The appellant attacks the fair trade practice provisions of the Code above mentioned and the respective State and Federal statutes as being in contravention of the Federal and State Constitutions. It is also charged that these trade practice provisions of the Code are not authorized by the statute.

SUMMARY OF ARGUMENT.

POINT I. The economic emergency which dominated and altered the Nation's competitive system made imperative the adoption of comprehensive legislation to rehabilitate trade and industry. (pp. 13-20)

A. The economic condition of the United States at the time of the enactment of the recovery legislation was serious. Overproduction had produced competitive abuses which demanded action to prevent the collapse of industry.

Atchison Railway Co. v. U. S., 284 U. S. 248, 260.
Home Building & Loan Association v. Blaisdell, 290 U. S. 398.

B. The effect of the depression and competitive abuses upon the automotive industry and the Motor Vehicle Retailing Trade threatened their very existence.

POINT II. The Recovery Acts and the Code meet all requirements of the Federal Constitution. (pp. 21-49)

A. The Acts and the Code of Fair Competition for the Motor Vehicle Retailing Trade, fulfill the requirements of the Fifth and Fourteenth Amendments.

1. The legislative purpose of the Acts was to preserve the economic system by substituting group action for cutthroat competition in the course of a normal development of governmental regulation of competitive practices.

The President's Message to Congress.
National Recovery Act (Sec. 1).
New York State Act (Sec. 1).
Legislative History (Appendices D and E, Vol. 2, pp. 28, 50).

A proper exercise of the legislative function is the determination of the particular policy deemed appropriate to regulate commerce or trade within the legislative jurisdiction.

Northern Securities Co. v. U. S. 193 U. S. 197, 337.
Nebbia v. New York, 291 U. S. 502.

2. The regulations provided by the Motor Vehicle Retailing Code are reasonable and tend to eliminate the competitive abuses that undermine the trade.

Enforcement provisions under the Federal and State Acts relate only to interstate and intrastate commerce, respectively.

Appellant's attack is primarily directed against the fair trade practice provisions of Article IV of the Code.

The trade practice provisions of Article IV, relating to the price of new cars and trade-in allowances for used cars are reasonable and appropriate measures for this Trade.

Nebbia v. New York, supra.

3. The provisions of the Code are not price fixing of the character condemned by certain decisions prior to the *Nebbia* case.

Tyson v. Banton, 273 U. S. 418, 429.
Williams v. Standard Oil Co., 278 U. S. 235.
Ribnik v. McBride, 277 U. S. 350.

These code provisions fall within the category of reasonable regulations of methods of competition which have heretofore been upheld.

U. S. v. Joint Traffic Bureau, 171 U. S. 504, 572.
Rast v. Van Deman and Lewis, 240 U. S. 342.

Tanner v. Little, 240 U. S. 369.
Central Lumber Co. v. South Dakota, 226 U. S. 157.
Merrick v. Halsey Company, 242 U. S. 568.
Aikens v. Wisconsin, 195 U. S. 194.
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American Can Company v. Ladoga Canning Co., 44 Fed. (2d) 763.
Porto Rico American Tobacco Co. v. American Tobacco Company, 30 Fed. (2d) 234.
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Federal Trade Commission v. Noma Electric Corporation, 15 F. T. C. 87.
Federal Trade Commission v. Oakes Company, 3 F. T. C. 35.
Federal Trade Commission v. Fleischman Yeast Co., 1 F. T. C. 119.

4. The procedural requirements of due process of law are satisfied.

Assigned Car Cases, 274 U. S. 564, 583.
Norwegian Nitrogen Company v. U. S., 288 U. S. 274, 317-19.
See detailed discussion under Point III of Brief, *infra*, pp. 49-55.

5. The appellant has not sustained any damage which would entitle him to the relief sought.

Finding of the Court below (R. (S) 25).
Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 170-171.

There is no merit in the claim of damage to others not motor vehicle dealers.

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576.
Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544-45.

There has been no denial of equal protection of the laws.

Nebbia v. New York, supra, at p. 521.

6. It appears that the statutes and Code provisions are reasonable and are well adapted to accomplish the end sought. The statutes and the Code fulfill all the requirements of due process.

Adams v. Tanner, 244 U. S. 590.
Booth v. Illinois, 184 U. S. 425.
McLean v. Arkansas, 211 U. S. 539.
Wilson v. New, 243 U. S. 332.

B. Congress may regulate all transactions in or affecting Interstate Commerce and the National Recovery Act goes no further.

Brooks v. United States, 267 U. S. 432, 438.
Hammer v. Dagenhart, 247 U. S. 251.
Swift & Co. v. U. S., 196 U. S. 375, 398.

C. The delegation of power made by the National Recovery Act is consistent with Constitutional requirements.

1. The necessity of legislative standards for administrative guidance.

Panama Refining Co. v. Ryan, ... U. S. ..., Jan. 7, 1935.

2. The Act enumerates the objects to be attained (Sec. 1) and sets up definite standards to guide the President. (Sec. 3 (a)).

These standards are fully equal to those in the Federal Trade Commission Act, Interstate Commerce Act, and others.

Federal Trade Commission v. Gratz, 253 U. S. 421.
Federal Trade Commission v. Keppel & Bro., 291 U. S. 304.

New York Central Securities Corporation v. United States, 287 U. S. 12.
Avent v. United States, 266 U. S. 127, 130.
United States v. Chemical Foundation, 272 U. S. 1, 12.
Radio Commission v. Nelson Brothers Company, 289 U. S. 266, 285.

D. The definiteness and certainty required in the definition of crimes are fully satisfied.

Champlin Ref. Co. v. Commission, 286 U. S. 210.
Avent v. U. S., 266 U. S. 127.
U. S. v. Grimaud, 220 U. S. 507, 522-23.

POINT III. The Motor Vehicle Retailing Code meets all Requirements of the statutes. (pp. 49-69)

A. The procedure in adoption and approval of the Code was in accordance with the statute.

1. Adequate notice was given of the hearing which preceded the adoption of the Code and full opportunity was afforded all those interested to appear and present their views.

2. The requisite findings were made by the President.

3. The appellant has failed to resort to its administrative remedy of seeking modification of or exemption from the Code which it should have sought prior to bringing a suit for injunction.

Hegeman Farms Corp. v. Baldwin, supra, p. 172.
Peterson Baking Co. v. Bryan, 290 U. S. 570, 575-76.
U. S. v. Illinois Central, 291 U. S. 457, 463, 465.
Porter v. Investors Syndicate, 286 U. S. 461, 470, 71.

B. The trade practice provisions of the Motor Vehicle Code comply with the terms of the statute.

1. The term "unfair competitive practices" embraces a broad field. This is shown by the legislative history of the act.

Fed. Trade Com. v. Keppel & Bro., 291 U. S. 304, 310.
Congressional Record, Vol. 77, pp. 4218-19.

2. In construing the term "Codes of fair competition", reference should be had to prior codes approved by the Federal Trade Commission in connection with trade practice conferences.

Annual Reports of Federal Trade Commission and other publications of the Commission, as cited.

3. The terms of the Recovery Act have a broader meaning than those of the Federal Trade Commission Act and authorize all of the trade practice provisions of Article IV of the Code, even though they be considered price regulations.

Sections 3 (a) and 3 (b) and records and reports above cited under Points B 1 and 2.

4. Code provisions are permitted by the Recovery Act even though considered price regulations.

C. The provisions of the Code do not violate the statutory prohibition of Sec. 3 (a) against monopoly and monopolistic practices.

Appalachian Coals v. U. S., 288 U. S. 344.
Appendix D, Vol. 2, pp. 28-49.

POINT IV. The State statute and the Code do not violate the Constitution of the State of New York. (pp. 69-73)

A. The constitutionality of the State Act has not been passed upon by the highest court of New York but

has uniformly been sustained by the appellate division.

Gross v. Jamaica Auction Galleries, 242 App. Div. 658.
Sherman v. Abeles, 241 App. Div. 676.
Sabatini v. Andrews, 276 N. Y. S. 502.

B. The final determination of whether the statute is in accordance with the State Constitution must be made by the highest court of New York and this Court has frequently stated its reluctance to pass upon such questions in advance of that determination.

Pelton v. National Bank, 101 U. S. 143.
Railroad v. Jarrett, 231 U. S. 298.
Terrace v. Thompson, 263 U. S. 197.
Porter v. Investors Syndicate, 287 U. S. 346.
Carstairs v. Cochran, 193 U. S. 10.

C. The New York cases cited by appellant are not applicable.

The Recovery legislation has been sustained in many lower court decisions including some sixty cases with reference to the Motor Vehicle Code, in the New York courts of original jurisdiction.

POINT I.

THE ECONOMIC EMERGENCY WHICH DOMINATED AND ALTERED THE NATION'S COMPETITIVE SYSTEM MADE IMPERATIVE THE ADOPTION OF COMPREHENSIVE LEGISLATION TO REHABILITATE TRADE AND INDUSTRY.

A. The Economic Condition of the United States at the Time of the Enactment of the Recovery Legislation.

The Federal and State Statutes here under attack were enacted at a time of grave emergency in the general economic conditions of the nation and of severe distress in the automotive industry and the motor vehicle retailing trade. (R. (S) 14, 17-20.) A separate point is made of the acute depression, not to justify any claim that past precedent be ignored or that constitutional provisions be distorted; but to show the altered character of the competitive abuses which the legislation was designed to correct and the economic conditions in the light of which the statutes must be construed. A brief statement setting forth with statistical exactness the economic plight of the country is essential to a sound judgment of this legislation.

Unemployment figures at the end of March, 1933, showed a total of 13,689,000 unemployed. Payroll figures for the first quarter of 1933 were 64 per cent less than 1929. (League of Nations World Economic Survey, p. 167) The total number of *persons employed* in factories fell from 101 in 1929 (1923 to 1925 = 100) to 59.4 in February, 1933. The total payrolls dropped even further, from an index number of 107 in 1929 (1923 to 1925 = 100) to 40 in February, 1933. (World Economic Review, pages 101, 102.)

National income showed a reduction from 82 billion dollars in 1929 to 49 billion dollars in 1933, a decline of 40 per cent. In the mining, manufacturing, construction and

transportation industries where wage payments could be segregated from other payments the decline of labor payrolls was from 15 billion dollars to 6 billion dollars, a decline of 60 per cent. The greatest previous decline in national income, since this data was first tabulated in 1909, was in the depression of 1921, when there was a contraction of only 14.4 per cent (Senate Document No. 124—74th Congress, 2nd Session, National Income 1929-1932, pp. 10, 14, as revised January, 1934, by Division of Economic Research, U. S. Department of Commerce).

Freight car loadings fell from an index number of 106 (1923 to 1925 = 100) for 1929 to 54 in February, 1933. The actual decrease was from 3,766,000 cars in February, 1929, to 1,971,000 in February, 1933. (World Economic Review, pages 115, 116.)

Receipts from foreign investments were reduced from 700 million dollars in 1929 to 308 million dollars in 1933. Loans to foreign borrowers were reduced from a total of 1.3 billion dollars in 1928 to zero in 1933. (World Economic Survey, *supra*, pp. 303, 310)

New capital issues were reduced from a total of 5.5 billion dollars in 1929 to 280 million dollars in 1933. (World Economic Survey, *supra*, p. 335) Total market value of all shares listed on the New York Stock Exchange September 1st, 1929, was 89 billion dollars; total market value on March 1st, 1932, 27.5 billion dollars, a reduction of approximately 68 per cent. Between the peak of March, 1930, and the low point of June, 1933, there was a shrinkage of 1.7 billion dollars in the annual rate of cash dividend payments on 600 common stocks, a reduction of over 60 per cent. (Moody's Weighted Index.)

Agricultural income was reduced from 10.5 billion dollars in 1929 to 4.2 billion dollars in 1932 (Annual Report, Secretary of Agriculture, 1934).

Bank clearings for New York City were reduced from 477.2 billion dollars in 1929 to 157.4 billion dollars in 1933,

for Chicago from 36.7 billion dollars in 1929, to 9.0 billion dollars in 1933.

The index of industrial production stood at 63 in February, 1933, compared with 118 in 1929 (on a base of 100—the average for 1923-25); construction activity had dropped to 19 from 118 in 1929. (World Economic Review 1933 published by Bureau of Foreign and Domestic Commerce, U. S. Department of Commerce, pp. 84, 112.) The general commodity price index fell from 95.3 in 1929 to a low of 59.8 in February, 1933 (Bureau of Labor Statistics, Wholesale Prices December, and Year 1933, page 1.)

These figures indicate clearly and without exaggeration the gravity of the problem faced by the legislative and executive branches of the government.

This Court has taken judicial notice of the depression, saying, "It is the outstanding contemporary fact dominating thought and action throughout the country"' *Atchison, etc., Railway Co. v. U. S.*, 284 U. S. 248, 260, decided January 4th, 1932. *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398. Judicial notice may be taken of the non-record facts above referred to, taken from authoritative publications. *Muller v. Oregon*, 208 U. S. 412, 420.

1929 not only marked the advent of the depression; it punctuated the end of an economic period whose outstanding characteristic had been continuous expansion of production. To this end of ever greater production had been bent the combined efforts of business, science and invention. World wide demand and heightened domestic purchasing power made it appear that no matter how great might be the technological advance in the mechanical process of production and the resultant increase in speed and capacity of production, demand would continue to keep ahead of supply. The dominant principle pursued was high-powered, continuous expansion of the facilities of production. The success of these efforts proved the fallacy of the emphasis placed upon increased production. Overproduction became sharply apparent when foreign market

places closed and domestic consumption was greatly impaired.

The desperate competition to market the over-abundance that could not be consumed, expressed itself through unfair methods of competition of a new character. Price cutting, a minor competitive abuse in the past economic period, was generally adopted by the nation's industries with wages of labor paying the greatest toll. Industry found itself inexorably committed to a descending spiral of price cutting and wage reduction, from which it was helpless to extricate itself. The process of disintegration reached a point of culmination in the compulsory bank holiday on March 6th, 1933, in the course of which every financial and banking institution was compelled to close its doors.

The contraction of business activity as the depression continued and the resulting shrinkage of consumption threw competition completely out of balance. Competition among buyers to acquire commodities, which normally counterbalances the competition among sellers to dispose of commodities, almost wholly disappeared. Excess productive capacity was apparent in practically every industry and in the case of many products overhanging surpluses of a burdensome character were in evidence. Such conditions existed throughout the nation in practically every industry and trade. Each business unit was under a driving force to obtain the largest possible share of diminishing demand in order to dispose of its surpluses and keep down its overhead. In an effort to keep going, both in the interest of himself and his employees, an employer would resort to price cutting in order to increase his volume. But every employer was under the same pressure and necessarily followed the same course. No one got any result. There was merely a wholly futile and destructive struggle. Ruthless price cutting ensued. Wages were forced down. Working capital was impaired. Credit dried up. There were no funds and no confidence for undertaking replacements, im-

provements or new enterprises. The capital goods industries were almost completely shut down. Buying by dealers was limited to the barest requirements as fear of falling prices and fear of further price cutting by competitors prevented adding to inventories. Consumer buying was in turn checked through falling wages, unemployment, the suspension of dividend and interest payments and even more by the general atmosphere of fear which obscured the outlook and paralyzed the initiative of each individual.

When in the past the equilibrium of the competitive system has been disturbed the Government has prescribed regulations designed to restore a normal balance and correct abuses. In the early part of 1933 the absolute need for such legislation that would assist industry to adjust itself to the radically changed economics and competitive conditions was manifest.

B. The Effect of the Depression and Competitive Abuses Upon the Automotive Industry and Motor Vehicle Retailing Trade.

The automobile industry is one of the largest in the United States and is one upon which many other industries are primarily dependent for their existence. (R. (S) 16) It employs directly and indirectly more than 4 million workers (R. (S) 17), one out of eleven of all persons gainfully employed in this country. The automobile industry ranks first as a consumer of iron and steel, rubber, plate glass, nickel, lead, mohair, upholstery leather and gasoline. (R. (S) 17) It uses approximately 14.5 per cent of all the lumber used in the United States. (R. (S) 17) The industry is divided into two distinct divisions, each an integral part of the other. (R. (S) 17) There is on the one hand the automobile manufacturer who produces new cars and on the other, the motor vehicle retail dealer who is engaged in their sale and distribution at retail. The welfare of the manufacturing industry is necessarily dependent upon the

efficient operation of the retail dealers who market the manufacturers' commodities. The following figures illustrate the effect of the national economic crisis upon the motor vehicle retail trade:

Employed 1929	427,459
Employed 1932	229,800
Wages paid 1929	$775,000,000
Wages paid 1932	$283,000,000
New cars sold 1929	5,600,000
New cars sold 1932	1,400,000
Value new cars sold 1929	$3,500,000,000
Value new cars sold 1932	$793,000,000

(R. (S) 19-20)

Between 1929 and 1932 there was a drop of approximately 75 per cent both in volume of business and value of sales. (R. (S) 18-19)

During the same period the average hourly rate of wage for employees had dropped approximately 47 per cent. (R. (S) 19)

The manufacturers in the automotive industry and the dealers in the Motor Vehicle Retailing Trade were thus subject to the same pressing forces which resulted in cut-throat competition throughout all trade and industry. In the effort to survive, price cutting, wage reductions, reduced volume, impairment of working capital, and stagnation in replacements and improvements followed one another in never ending succession. In the Motor Vehicle Retailing Trade, this struggle developed competitive abuses similar in general character to those common to all industry and trade as well as evils peculiar to this particular trade.

In the automotive industry, it has long been the practice for the manufacturers to establish, publish and control prices on new cars and retail motor vehicle dealers are compelled through contractual arrangements to respect the sales prices set by the manufacturers (R. (S) 25), or lose

their franchises. However, with the intense competition as a consequence of the reduced volume of sales and declining purchasing power of the consuming public it was inevitable that unreasonable and unwarranted discounts or rebates below manufacturer's list prices were resorted to in an effort to secure business.

Eighty-five per cent of all sales made by the Motor Vehicle Retailing Trade involve a trade-in allowance on a used car. The most serious competitive abuse occurred in the granting of allowances far in excess of the values of used cars offered in trade as a part of the purchase price for new cars. (R. (S) 17, 18) This trade-in allowance became the medium through which excessive rebates and discounts were allowed and price discrimination as between different customers and cut-throat competition between dealers were practiced. These over-allowances were largely deliberate but in part unintentional. It was often impossible to determine the reasonable value of a used car. No accurate information was available for many models, notwithstanding the fact that there were some Appraisal Books available which gave some information as to values of used cars. Over 5,000 types of used cars are in the hands of the public and no single dealer could possibly have sufficient knowledge to determine the value of each one of these used cars, any one of which might be offered as a trade-in. (R. (S) 21)

With unbridled competition existing among the dealers for the greatly reduced volume of business in new cars, the evil of excessive trade-in allowances on customers' old cars grew to such serious proportions that the very existence of the industry was threatened. The dangerous consequences of this destructive competition had been fully manifested even before the economic depression became a contributing factor, but as the depression progressed this destructive competitive practice was intensified and the evil result aggravated so that this abuse became one of the major factors resulting in the disorganization and disruption of

the industry and caused sharp and drastic reductions of wage and labor standards throughout the trade. (R. (S) 18, 19) It was impossible for individuals or groups to protect themselves against this destructive practice even when large majorities of dealers in a community recognized its evil and its futility. In times of such restricted consumption and low purchasing power as prevailed during the past few years, all are forced to follow the competitive conduct of the few, no matter how impossible it may be for any one to secure any possible advantage by so doing when all follow the destructive practice.

The dealer making excess trade in allowances could only minimize his losses by saddling them upon his employees through the payment of sub standard wages. Otherwise, the entire loss would have to come out of the dealer's capital. This situation resulted in terrific losses to the dealers and in dissipation of their capital. Many were forced out of business; those remaining in business cut wages and greatly reduced the number of employees. By 1933 a large proportion of the automobile dealers in the country were on the verge of insolvency. (R. (S) 19)

To meet these grave conditions in industry generally, including those in the Automotive Industry and the Motor Vehicle Retailing Trade, and to prevent even more disastrous consequences, the National Recovery Act and the supplemental legislation of the State of New York were enacted. Against this background the legal problems occasioned by their enactment and exercise must be measured and determined. The Chairman of the Committee on Ways and Means in presenting the Recovery Act to the House of Representatives characterized it as the keystone in the arch of industrial rehabilitation and recovery favored by industry, agriculture and labor; a measure which charted a middle course between monopoly and the "error of unfair competition which now has a stranglehold upon business." (77 Cong. Rec. p. 4202.)

POINT II.

THE RECOVERY ACTS AND THE CODE MEET ALL REQUIREMENTS OF THE FEDERAL CONSTITUTION.

A. The Acts and the Code of Fair Competition for the Motor Vehicle Retailing Trade, Fulfill the Requirements of the Fifth and Fourteenth Amendments.

The appellant contends that Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, as a State regulation, and the State Recovery Act which makes it effective, deny it the rights guaranteed by the Fourteenth Amendment. While the Code, as a Federal regulation, is not involved in this suit against a State officer to enjoin the enforcement of a regulation adopted pursuant to a State statute, the appellant charges that the National Industrial Recovery Act is in violation of the Federal Constitution. In view of the fact that the limitations of the Fifth Amendment and the Fourteenth Amendment, in their respective fields, are governed by substantially the same principles, they will be discussed together.

The guarantee of due process requires that the legislation and regulation shall be reasonable and not arbitrary or capricious and that the means selected shall have a real and substantial relation to the ends sought to be attained. The determination of whether these requirements have been met necessitates an examination of the circumstances which occasioned the legislation and of the conditions to which the regulatory measures are applied, which matters have already been reviewed (Point I, *supra*, pp. 13-20). Attention should now be given to the terms of the statutes and to the method employed, namely, the Code of Fair Competition, to remedy the evils existing in the Motor Vehicle Retailing Trade.

Legislative purposes of the statutes.

In requesting the National Recovery Act, the President, in a message submitted to Congress on May 17th, 1933, stated:

> "Before the special session of the Congress adjourns, I recommend two further steps in our national campaign to put people to work.
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> My first request is that the Congress provide for the machinery necessary for a great cooperative movement throughout all industry in order to obtain wide reemployment, to shorten the working week, to pay a decent wage for the shorter week, and to prevent unfair competition and disastrous overproduction.
>
> Employers cannot do this singly or even in organized groups, because such action increases costs and thus permits cut-throat underselling by selfish competitors unwilling to join in such a public-spirited endeavor."

The Federal Act, approved June 16, 1933, declared the existence of an emergency in the following language:

> "A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist." (Section 1)

The State Act likewise recognized the same emergency in the State of New York, declaring in Section 1 thereof:

> "A national emergency productive of widespread unemployment and disorganization of industry,which likewise prevails in the State of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the State of New York, is hereby declared to exist. The

existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred and thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state." (R. 33-34.)

To meet this emergency the purposes of the National Act were stated in the following terms:

"It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanction and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." (Section 1.)

The State Act adopted the same objectives and expressly declared its purpose to cooperate with the administration of the National Act and to make effective a uniform regulation applicable to intrastate and interstate transactions. This portion of the State Act provided:

"It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and pur-

poses declared in said act of Congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York." (R. 34.)

Both Statutes exempt Code provisions and group action in compliance therewith from the prohibitions of the respective Federal and State Anti-Trust laws, a recognition that the pressing industrial problems to be met were those of production in excess of consumption and ruthless competition to secure a share of vanishing markets. To this end group action, under adequate control and supervision was substituted for cutthroat competition and was encouraged to the extent that such action did not approach monopoly. Ample evidence that this was the purpose of the legislation is contained in the Congressional proceedings. (Appendices D and E, vol. 2, pp. 28, 50.)

The Legislative purpose of the Recovery Acts is in pursuance of an economic policy differing from that upon which the Anti-Trust Acts have been based. Both sets of legislation relate to the same subject matter in that they pertain to the control of competitive methods and practices.

The tremendous technological advance and great expansion of productive capacity has generated its own category of trade abuses based upon the desperate competition of business to secure as large a portion of a vanishing market as possible. Ruthless competition depending largely upon price cutting and reduction of costs through the sweating of labor, has altered the economic background and has compelled the enactment of new legislation designed to curb and correct present competitive evils. The concept of competition was changed.

It is the function of the legislative branch of the Federal and State Governments to choose between economic theories and determine the particular policy deemed appropriate to regulate the commerce or trade subject to their respective jurisdictions.* *Northern Sec. Co. v. U. S.*, 193 U. S. 197, 337; *Nebbia v. New York*, 291 U. S. 502, 537. There can be no difference in constitutional power where the purpose, as in the Anti-trust Acts, is to protect the public against the evils of unduly high prices and where, as here, the purpose is to protect the manufacturer and dealer and their employees against the evils of unduly depressed earnings. The Recovery Statutes instead of representing an effort to supplant the present (economic) system, represent an effort to preserve the economic system by relieving the tremendous strain that has been placed upon it and by adjusting it to its changed basis. The Recovery Statutes are not a violent experiment but are normal developments of governmental regulation of competitive practices.

Clearly the Federal and State Recovery Acts here under consideration had a proper legislative purpose and the means adopted had a real and substantial relation to the object sought to be attained.

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*Examples of Government intervention to place a roof upon competitive forces are found in the legislation fixing the prices of fuels, *Highland v. Russell Company*, 279 U. S. 254 and the rental cases—*Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Company v. Feldman*, 256 U. S. 170; *Levy Leasing Company v. Siegel*, 258 U. S. 242. A somewhat similar precedent is found in the governmental control of prices exercised during the War with the cooperation of industry through the War Industries Board, (See American Industry in the War—a report of the War Industries Board by Bernard M. Baruch; Government Control Over Prices, History of Prices During the War by Paul Willard Garrett, G. P. O. 1920). The National Recovery legislation is of the character designed to furnish a floor below which competitive price cutting will not be allowed to reach. A recent example of this is the Milk Legislation of the State of New York sustained in *Nebbia v. New York*, 291 U. S. 502, and finds earlier precedents in the legislative activities referred to in that decision.

The regulations provided by the motor vehicle retailing code are reasonable and tend to eliminate the competitive abuses that undermine the trade.

One of the methods employed for accomplishing the objectives of the Statute is that provided in Section 3 (a) of the National Recovery Act authorizing the formulation of Codes of Fair Competition which, when approved by the President, are to be enforced as compulsory regulations in the trade or industry to which they relate. The compulsory enforcement provided by the Federal Act relates only to transactions in or affecting interstate commerce. The State Statute provides that when the Code of Fair Competition is duly filed in accordance with the statutory provisions, it thereupon becomes a standard of fair competition for intrastate commerce and may be enforced in the State Courts. No better means to this end could have been devised than this legislative cooperation between the Congress and the Legislature of the State of New York, as expressed by their respective Recovery Acts.

The immediate question is whether the trade practice provisions of the Code under attack are such as to meet the constitutional requirements here under discussion.

The essence of appellant's attack.

The principal attack upon the Code of Fair Competition by the appellant is directed against Article IV A (R. 40-42) which regulates the maximum allowance that may be made by a dealer on the trade-in of a used car as part payment on the purchase price of a new automobile.

Although the bill of complaint refers to the requirement contained in the Code of Fair Competition prohibiting discounts and rebates in the sale of new automobiles, as set forth in Article IV B (2) (R. 43), this provision is not in issue as is shown by the following findings of fact to which appellant has agreed:

"That prior to the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade the Retail Motor Vehicle Dealers were compelled to respect the sales prices established by the manufacturers of new motor vehicles and maintenance of price by automobile manufacturers through contractual agreements with dealers or agents has long existed in the trade.

"The manufacturers of automobiles are not subject to the terms of the Code of Fair Competition for the Motor Vehicle Retailing Trade and each manufacturer has complete control of the price of his product and may increase or lower his price to meet the competitive forces of his fellow manufacturers. The factory-made prices of new cars of different makes are highly competitive.

"The complainant has not set forth or complained of an instance where it endeavored to sell a new Chevrolet automobile openly in competition with other Chevrolet dealers at less than factory established prices" (R. (S) 25).

Code Regulation of Trade-In Allowances.

The history of the automotive industry even prior to 1929 exhibits clearly the intense pressure exerted by the expansion of production, and upon the Motor Vehicle Retail Distributing Trade to market its products. The increasing pressure, confined by contractual arrangements prohibited price cutting on new cars, forced an outlet through trade-in allowances on used cars.

Through the trade-in allowances, upon which are based 85 per cent of all sales of new cars, the industry, seeking to maintain its sales volume in a shattered market and compelled by the force of destructive competition, resorted to drastic price cutting by granting secret rebates and exorbitant discounts in the form of overallowances on used cars. Individually the dealers were helpless. Their vast numbers and widespread locations prevented the possibility of a general effort at self-regulation. Local regulations, seeking by the establishing of maximum hours and minimum wage

rates to curb the destructions of industry, proved ineffectual (R. (S) 20).

In view of the fact that there are more than 5,000 different types of cars (makes, models and years) in the hands of the public (R. (S) 21) it has long been impossible for any single dealer to have a complete knowledge of their constantly changing market value. Before the adoption of the Code, appraisal books based on reports of used car sales, were circulated among dealers as some aid in meeting this problem. These appraisal books had an objective similar to the Guide Books contemplated by the Code, but lacked their advantages of accurate, complete and timely compilation.

The method for determining maximum trade-in allowances provided for in the Code requires the submission of sworn reports of all used cars sold by Motor Vehicle Retail dealers. The sales so reported are of cars which ordinarily have been reconditioned by the dealer after he has acquired them as a trade-in. Such cars obviously have a much higher value when sold by the dealer than when originally received as a trade-in on the sale of a new car. Not all sales are included in the compilation but only those which represent used cars of the better grade. The formula stated in the Code calls for the elimination of sales not properly representative. The maximum trade-in allowance is thus substantially above the mere arithmetical average of all sales. Furthermore, used cars depreciate at the rate of 2% to 3½% a month. In spite of the fact that the sales reported occurred during the prior sixty-day period, no deduction for depreciation is provided by the formula. Thus the resulting figures represent an amount substantially in excess of the average values of used cars actually traded in, first, because the average is based upon sales prices received for used cars after they have been improved by reconditioning; second, because no deduction is made for depreciation; and, third, because a substantial portion of non-representative sales are eliminated. From this figure of the fair sales value of recon-

ditioned cars a deduction of a percentage of 5% to 15% is made representing the cost of selling and handling. The resulting figure is the maximum trade-in allowance.

The results determined by the application of the formula are subject to the approval of the National Recovery Administration. They are published and revised monthly in an Official Guide Book which is also subject to the approval of the National Recovery Administration. Thus it is evident that the method provides for the determination of a figure which will reasonably represent a fair maximum trade-in allowance for the particular type and model for the particular trade area in which a given dealer may be located.

The soundness of the trade-in allowance regulation of the Code is that neither the Government, the Code Authority nor any specific agency (with the possible exception of the consuming public itself) determines the value of the used cars. The basic law of supply and demand determines this value. Through the mechanism of Article IV of the Code, the free and unrestricted play of these forces are reflected in the sworn reports collected and compiled of the actual sales of used cars.

The argument advanced by the appellant (Brief, p. 125) that the "average maximum figure is arbitrary and capricious" is based on pure hypothesis that ignores the formula and safeguards employed by the Code to insure a high maximum figure based on better grade used cars and the result actually achieved in its operation. The appellant offered no proof that in any single instance the maximum Guide Book allowance was unfair or even that the owner of a used car would receive a sum in excess of the Guide Book allowance through the free and unrestricted market of the used car dealers. The appellant's entire argument on this point is in complete disregard of the record and depends entirely upon unsupported conclusions contained in its affidavits which are contrary to the findings of fact. There is simply no proof of the plight of the owner of a better grade

used car or of the difficulty of the Motor Vehicle dealers portrayed in the appellant's brief (pp. 125-127).

Nor are the statements made by the appellant of "oppression, hypocrisy and evasion" and "resort to the use of dictaphones" (Brief, p. 63) supported by the record or findings herein.

The lower Court's findings and conclusions.

Upon the evidence, the Statutory Court made findings of fact fully covering the method of determining and publishing the maximum trade-in allowances (R. (S) 22-26). Among other things, the Court found that the agency designated to compile the reports and determine, subject to the approval of the Administration, the maximum trade-in allowances, did not fix arbitrary prices without regard to reported sales and that it performed its duty conscientiously and complied both with the spirit and language of Article IV in arriving at the allowances published (R. (S) 24). The Court also found that the comprehensive reporting system provided in Article IV of the Code fixed a fair value in terms of money on used cars offered in trade as part consideration in the purchase of new automobiles (R. (S) 24). It also appears from the findings that the appellant has failed to support its charge that it lost sales by reason of any inadequacy or unfairness of the official guide book trade-in allowances (R. (S) 25).

In its opinion the Statutory Court said, 8 F. Supp. 437 at page 440, with respect to the reasonableness of the maximum trade-in allowances:

> "The code method of ascertaining the maximum used-car allowance is reasonable. To be sure, all practical price regulation may have as a consequence some individual inequalities. But a price based on an average of business or of trades in the past is harmonious and seems to be founded in fairness. An average arrived at from the amounts some of which are in

excess of and some below the mean does not work for invalidity as long as the basic principle or method is fair. The principle of regulation of price is fundamentally fair even though there is some reasonable disregard in individual cases. Such disregard is inherent in any broad social policy.

"There are no facts found in the complaint and moving papers supporting the plaintiff's claim of an unfair difference between the maximum used-car allowance permitted by the Code and the reasonable value of a car submitted for trade-in purposes. To support the plaintiff's case, it must be shown that the method of fixing the trade-in allowance is arbitrary or discriminatory, leading, by caprice or otherwise to unreasonable discrepancies. No more reasonable method of regulation for the correction of an evil of unfair trade is pointed out. Without a convincing showing by specific instances of unreasonable differences between the maximum permitted under the code and the real market values, no general charge of unconstitutionality can be sustained. *Jeffrey Mfg. Co.* v. *Blagg*, 225 U. S. 571; *Plymouth Coal Co.* v. *Pa.*, 232 U. S. 531."

The Court also found as a conclusion of law:

"The method provided in the Code of Fair Competition for the Motor Vehicle Retailing Trade of ascertaining the maximum used-car allowance is reasonable" (R. (S) 42).

The Code provisions are appropriate regulations under the rule of the decisions prior to the Nebbia case.

It has been demonstrated that the Motor Vehicle Code regulations are "appropriate measures" and that there is a "proper occasion" for their exercise. They thus meet the test laid down in *Nebbia* v. *New York*, 291 U. S. 502, and many other cases. They also equally satisfy the rule of the earlier cases such as *Tyson* v. *Banton*, 273 U. S. 418, 429, which denied the right of Governmental authority to fix prices. The regulations of this Code are not direct price fixing measures of the character declared void in those cases.

The establishment of a maximum allowance for used cars traded in upon the purchase of a new car, as prescribed by Article IV A of the Code, is in no sense the fixing of a price to be charged by the owner of the property sold. This Code provision does not apply directly to the owner (the seller) of the used car, who is also the prospective purchaser of a new car. The owner of the used car is free to sell his used car at any price he can get. Used car markets are open to him and there are many exclusive used car dealers through whom the car can be marketed (R. (S) 26).. The regulation applies only in the event the owner of the used car undertakes to trade it in upon the purchase of a new car and in such a transaction the regulation applies to the dealer (the purchaser) and not to the owner (the seller) of the used car. The object of the provision is to correct the serious competitive abuses, that were destroying the industry, namely, of secret rebates and exorbitant discounts allowed to purchasers under the guise of trade-in allowances on used cars received from the purchaser of a new car. The Code imposed no restriction upon the price at which the used car may be resold by the dealer after it has become his property.

Thus, it is evident that the trade-in allowance provision is not at all in conflict with the decisions prior to that in *Nebbia* v. *New York*, 291 U. S. 502. As was said in *Tyson* v. *Banton*, 273 U. S. 418, 429, one of the basic principles upon which the Court held that prices could not be regulated in a private business was "That the right of the owner to fix a price at which his property shall be sold or used, is an inherent attribute of the property itself, and, as such within the protection of due process of law clauses of the Fifth and Fourteenth Amendments." The trade-in allowance provision is not at all in conflict with this principle. It imposes no requirement that the owner of the old car must sell at any particular price; it imposes no requirement that the dealer, when he has become the owner of the old car, must sell it at any particular price. It prescribes only

a regulation of the transaction between a dealer and a prospective purchaser of a new car when that purchaser trades in an old car at the time of the purchase of a new one.

The restriction upon the retail price of a new motor vehicle, namely, that the dealer shall not sell at less than factory list price plus the additional items mentioned in Article IV B(1) (R. 26), does not place under governmental control fixation of the price of a new motor vehicle. The list price is fixed by the factory and no provision of the Code or any regulation thereunder imposes any restriction upon changes in the factory list price. The Court below has found (R. (S) 25) and it may be judicially noticed that there is intense competition between the factories in the value of new automobiles and the factory established prices are always subject to change. The only requirement of the Code is that once the factory list price has been established, it shall be adhered to by the dealers as the minimum price. This is in accordance with the long established practice of the trade under manufacturer-dealer contracts (R. (S) 25). This is quite different from having governmental authority prescribe the price at which a gallon of gasoline shall be sold as in *Williams* v. *Standard Oil Company*, 278 U. S. 235, or fixing the fee charged by an employment agency as in *Ribnik* v. *McBride*, 277 U. S. 350, or prescribing that a quart of milk shall be sold at a minimum price of 9 cents as in *Nebbia* v. *New York*, 291 U. S. 502. Were this Code a direct price fixing measure, governmental authority would direct that Model A cars shall be sold for $500.00, Model B cars for $600.00, Model X cars for $2,000.00.

In this case power to fix prices is retained by the manufacturers and is not exercised by the government. This provision of the Code insofar as it affects the price of new motor vehicles is equivalent to a regulation requiring the publication of prices and adherence to such published prices. Such a regulation is a regulation of trade practices to pre-

vent unfair competition, to prevent injury to competitors through secret rebates and to prevent unfair treatment of the consuming public through price discrimination.

Both the Federal and the State Governments, within and outside the field of interstate commerce, respectively, have from time to time enacted legislation designed to regulate methods of competition in trade and these statutes have uniformly been upheld as not in violation of the Fifth or Fourteenth Amendments to the Federal Constitution. Outstanding examples in Congressional Legislation are the anti-trust laws (Sherman Act, Title 15 U. S. C. 1-7 and Clayton Act, Title 15 U. S. C. 12-27, and the Federal Trade Commission Act, Title 15 U. S. C. 45). The anti-trust laws made illegal all contracts, combinations or conspiracies in restraint of interstate commerce and trade, and prohibited with certain exceptions, price discrimination between purchasers which tended to lessen competition or create monopolies. The Federal Trade Commission Act declared illegal all unfair methods of competition in commerce. All of this Federal Legislation is clearly a regulation of purely private business endeavor but has been upheld as valid and constitutional under the Fifth Amendment. *U. S.* v. *Joint Traffic Bureau,* 171 U. S. 505, 573.

Among the competitive practices regulated or prohibited under the above legislation are: Unduly extensive combinations in an industry, *Live Poultry Dealers Protective Association* v. *U. S.*, 4 Fed. (2d) 840; preferential price discriminations, *American Can Company* v. *Ladoga Canning Co.*, 44 Fed. (2d) 763, *Porto Rico American Tobacco Co.* v. *American Tobacco Company,* 30 Fed. (2d) 234; false and misleading labels in advertising, *Royal Baking Powder Co.* v. *Federal Trade Commission,* 281 Fed. 744; and sales below cost accompanied by representation tending to injure or discredit competitors and deceive purchasers, *Sears Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307.

Examples of state statutes of the type referred to are as follows: Statutes prohibiting the giving of premiums or

trading stamps in connection with retail sales except upon the payment of a high tax, *Rast* v. *Van Deman and Lewis*, 240 U. S. 342; *Tanner* v. *Little*, 240 U. S. 369; statutes prohibiting discrimination by a manufacturer between different localities in the matter of prices charged for his products for the purpose of destroying competition, *Central Lumber Company* v. *South Dakota*, 226 U. S. 157; a statute limiting insurance commissions, *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 51; the so-called "blue sky laws," *Merrick* v. *Halsey Company*, 242 U. S. 568; and state statutes preventing combinations in restraint of trade, *Aikens* v. *Wisconsin*, 195 U. S. 194, *Grenada Lumber Company* v. *Mississippi*, 217 U. S. 433.

In a number of decisions, the Federal Trade Commission which is charged with the duty of preventing unfair methods of competition in commerce, has found price cutting an unfair method of competition. *Federal Trade Commission* v. *Noma Electric Corporation*, 15 F. T. C. 87; *Federal Trade Commission v. Oakes Company*, 3 F. T. C. 36; *Federal Trade Commission* v. *Fleischman Yeast Co.*, 1 F. T. C. 119; see also stipulation calling for abandonment of price cutting, 11 F. T. C. 524.

One of the primary purposes of the Clayton Act, c. 323, 38 Stat. 730, U. S. C. Title 15, Section 13, was to prohibit price discrimination when its effect was to substantially lessen competition or tend to create a monopoly.

The Courts have recognized that price cutting below a reasonable minimum may constitute an unfair method of competition. See for example *United States* v. *American Naval Stores*, 186 Fed. 592 (later reversed under the name of *Nash* v. *United States*, 229 U. S. 373, but on a different ground); *Story Parchment Company* v. *Patterson Company*, 282 U. S. 555, 561; *Standard Oil Company* v. *United States*, 221 U. S. 1.

The foregoing distinction between direct price fixing by governmental authority and the regulation of competitive practices was commented upon in *Ribnik* v. *McBride*, 277

U. S. 350, 355, where the Court recognized the rights of a State to license and regulate the business of an employment agent, but denied the power to fix the price which the employment agent should charge for his services.

A complete analogy to the provisions contained in Article IV of the Code is set forth in the opinion of this Court in *Tyson* v. *Banton* (*supra*, 443-444) where the Court denied the right of the State of New York to fix the maximum price at which theater tickets might be sold, but cited with approval an ordinance in Illinois "which required (1) that the price of every theater ticket shall be printed on its face and (2) that no proprietor, employee, etc., of a theater shall receive or enter into any arrangement or agreement to receive more." The distinction made by the Court in approving this regulation applies with equal force to the facts in the present case. The Court stated, "but the important distinction between that case (the Illinois ordinance) and this is that the ordinance did not forbid the resale of a ticket by a purchaser of it for any price he was able to secure, or forbid the fixing of any price by the proprietor which he thought fit, provided that price was printed on the face of the ticket." In the present case, the automobile manufacturer is not prevented from fixing any price he desires; the only requirement is that once the price is established, it shall be observed and all customers treated uniformly.

Conditions in the motor vehicle retailing trade have substantially improved.

In answer to the appellant's charge that the code regulations have hampered and hamstrung the Motor Vehicle Retailing Trade, we point to the fact that conditions in that trade have substantially improved.

At the time of the hearing in this case the Code had been in effect for less than a year. Statistics of motor vehicle sales and registrations were then available only for the first six months of 1934. But even for this short space of time,

a substantial improvement in both the business and employment within the Motor Vehicle Retailing Trade had been shown since the adoption of the Code (R. (S) 26). Total registrations for new car sales in the first six months of 1934 were 995,121 compared with 663,625 in the first six months of 1932, an increase of approximately 50 per cent (R. (S) 26). Monthly retail sales of all motor vehicles in the United States for the first six months of 1933 showed a total of 840,511 compared with a total of 1,272,443 for the corresponding months of 1934. This was an increase of more than 50 per cent (R. (S) 27). Employment in the manufacturing end of the automotive industry showed a total in May, 1934, for members of the National Automobile Chamber of Commerce of 206,965 compared with 99,343 in the month of May, 1933, an increase of over 100 per cent (R. (S) 26).

Recovery has been the outstanding feature of the entire automotive industry during the year 1934. Since the hearing in this case official reports confirm the improving trend in the Motor Vehicle Retailing Trade as recited in the Findings of Fact.

The preliminary report on the study of Regularization of Employment and Improvement of Labor Conditions in the Automobile Industry, recently submitted by the Research and Planning Division of the National Recovery Administration, makes the following statement (page 35):

> "This provision of stipulated top trade-in values for used cars has made possible a profitable operating record for thousands of dealers who before were forced to give away their entire margin in order to consummate a new car sale."

This report also indicated the marked improvement in the volume of sales in the trade, in the following statement (page 42):

> "The value of product of the automobile industry in 1929 was placed at $3,576,645,000. By 1932 the total

value of the product of the industry had declined to $793,000,000, increasing to $987,000,000 in 1933 and to $1,453,800,000 in 1934."

The annual report of the New York State Commissioner of Motor Vehicles published for the year 1934 reveals that the number of motor vehicles registered in New York State during the year 1934 increased by approximately 53,000 and the receipts from registrations and license fees by $2,000,000. 1,943,000 passenger cars were registered in the State of New York for the year 1934, the largest number of passenger vehicles in its history. These substantial increases in the registrations in the State of New York indicate equivalent increase in the volume of sales and furnish the best refutation of appellant's allegations (Brief, pp. 62, 127, 134-35) that the Code has hampered recovery in the Motor Vehicle Retailing Trade.

This improvement in the trade confirms the conclusion that the State and Federal Statutes and the Code are reasonable regulations of trade and have a real and substantial relation to the objects sought to be attained. It is submitted that there is nothing arbitrary or capricious in the regulations provided by the Motor Vehicle Code.

Procedural requirements of due process are satisfied.

The notice, hearing and other procedural steps in connection with the adoption of the Motor Vehicle Retailing Code fully meet the requirements of due process. The function exercised by the Recovery Administration in the adoption of the Code was the establishment of a rule of general application to be operative in the future. Such a function was legislative in character, but limited by the restrictions and standards specified in the Act. In proceedings of such character due process does not require that everyone who may conceivably be affected by such rule be actually heard in person. It is sufficient that reasonable notice be given of the hearing and that parties desiring to appear be

permitted to do so. *Assigned Car Cases*, 274 U. S. 564, 583. The nature and conduct of the hearing were in conformity with the functions being exercised. *Norwegian Nitrogen Company* v. *U. S.*, 288 U. S. 294, 317-19.

In the discussion under Point III the procedural steps in the adoption of this Code are examined in detail to show that all of the statutory requirements were met. (*Infra*, pp. 51-55.) That detail need not be repeated here. It will clearly appear from the examination of the procedural steps taken that all constitutional requirements with respect to procedure were fully satisfied.

Appellant has not shown damage.

The appellant's claim that it has been damaged by the Code provisions is highly speculative and not warranted by the record. Its claim is dependent first upon the unsupported premise that the appellant has lost sales by virtue of the Code regulation. The only proof offered in this respect was the unsupported conclusion of the appellant (R. 48) and the Court found that the appellant had lost no sales by reason of any alleged unfairness in the Official Guide Book trade-in allowances (R. (S) 25). Appellant's claim depends, secondly, upon the premise that such sales, had they been consummated, would have returned profits. It is reasonable to conclude in view of the court's findings as to the fairness of the maximum trade-in allowance figures that the appellant instead would have sustained losses. See *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163, 170-171.

The appellant's charges (Brief, p. 126) of damage to used car owners are inappropriate. It is obvious that used car owners are not compelled to accept any trade-in allowance but are free to dispose of their property either by direct sale to other members of the public or through the free channels of the used car dealer (R. (S) 26). In any event, this claim, if it possesses any merit, cannot be

advanced by the appellant but must be advanced by a member of the class adversely affected. *Jeffrey Manufacturing Company* v. *Blagg*, 235 U. S. 571, 576; *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, 544-545.

Appellant also charges that the statutes and the code regulations denied it equal protection of the laws. There is no showing that the code regulations place the appellant at a disadvantage or in fact affects him adversely and this alone is fatal to the claim of denial of equal protection. *Nebbia* v. *New York*, 291 U. S. 502, 521.

The regulations of the Code are reasonable, founded on trade customs of long standing that have been developed both in design and application and carefully adapted to the end sought. It follows that the Statutes in question and the trade practice regulations of the Code fulfill all the requirements of the Fifth and Fourteenth Amendments of the Federal Constitution. *Nebbia* v. *New York*, 291 U. S. 502, 525; *Adams* v. *Tanner*, 244 U. S. 590; *Booth* v. *Illinois*, 184 U. S. 425; *McLean* v. *Arkansas*, 211 U. S. 539; *Wilson* v. *New*, 243 U. S. 332.

B. Congress May Regulate All Transactions in Or Affecting Interstate Commerce and the National Recovery Act Goes No Further.

The argument in appellant's point I A (Brief, pp. 6-35) is of doubtful relevancy to the issues here. There can be no constitutional objection to Congress directly or through administrative agencies, setting up standards or rules believed to be in the public interest and undertaking to secure their voluntary observance through educational or promotional activities. Only when Congress undertakes to compel obedience to a rule or standard does the question of Federal power over the subject matter arise. The compulsory features of the National Recovery Act are specifically limited to "transactions in or affecting interstate or foreign commerce."

The case of *Hammer v. Dagenhart*, 247 U. S. 251, is no insurmountable obstacle, as urged by appellant, (Brief, p. 16) to Federal regulation of transactions which in fact affect interstate commerce. *Brooks v. United States*, 267 U. S. 432, 438. The extent of Federal power depends upon the state of facts. *Stafford v. Wallace*, 258 U. S. 495; *Tagg Bros. v. U. S.*, 280 U. S. 420; *Chicago Board of Trade v. Olsen*, 262 U. S. 1; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295; *U. S. v. Ferger*, 250 U. S. 199; *Dahnke Walker Milling Company v. Bondurant*, 257 U. S. 282.

Conditions may so change that an exercise of power held invalid upon one state of facts may be valid at another date upon a different state of facts. *Abie State Bank v. Bryan*, 282 U. S. 765; *Nashville, Chattanooga & St. Louis Railway v. Webster*, decided March 4, 1935, No. 183, October Term, 1934.

In answer to the appellant's charge that the National Recovery Act is an effort to override the field of State action, it is contended that the zone of State and Federal action depends upon the facts in each particular case. This is proven by the constant development in the application of the law by this court to the individual cases as they have been presented before it. It is not necessary here to draw the line of demarcation between State and Federal authority to regulate the retail sales of motor vehicles.

It is obvious that the breakdown in the retailing trade had a disastrous effect upon the motor vehicle manufacturing industry. The court below found that the Motor Vehicle Retailing Trade is an integral part of the manufacturing industry. The tremendous diminution in production of over 75 per cent that occurred in the automobile manufacturing industry can in a large measure be attributed to the destruction of the Motor Vehicle Retailing Trade (R. (S) 19). The exact extent of the reduction in interstate commerce between the factories and the motor vehicle dealers located throughout the country was 4,200,000 motor vehicles that had a dollar volume of $2,707,000,000. This does not take into consideration the

equally sharp reduction in interstate commerce in iron, steel, gasoline, rubber, plate-glass, nickel, lead, mohair and upholstery leather of which the automobile industry is the leading consumer or of lumber of which the automobile industry consumes approximately 14.5 per cent of all lumber used in the United States.

The cases cited by the appellant do not hold that the businesses involved could not be regulated in a proper case. They decided merely that under the facts of the particular case there was no evidence that the acts complained of burdened or affected interstate commerce. "Commerce among the States is not a technical, legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *U. S.*, 196 U. S. 375, 398.

The appellant's argument (p. 26) that to sustain the validity of the Recovery Statute necessitates the overthrow of all of the doctrines with respect to interstate commerce is based on a failure to grasp the significance of the principles applied by the Court. All that is necessary is the normal, and natural development of the law to a statement of facts that have been revised by the tremendous technological advance of industry and its method of production.

C. The Delegation of Power Made by the National Recovery Act Is Consistent with Constitutional Requirements.

Section 3 (a) of the National Recovery Act, pursuant to which the Code of Fair Competition for the Motor Vehicle Retailing Trade was adopted and approved, is assailed on the ground that it is an unconstitutional delegation of legislative power by Congress to the President.

The authorities and precedents relating to the delegation of legislative power have been so fully reviewed in the two learned opinions of this Court in the recent case of *Panama Refining Company* v. *Ryan*, decided January 7, 1935, that any detailed discussion here of the principles involved would appear superfluous. The majority opinion said:

"Accordingly, we look to the statute to see whether the Congress has declared the powers with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition * * * undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the National Legislature could not deal directly. The constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicability which will enable it to perform its functions in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate levies within prescribed limits and the determination of facts to which the power, as declared by the legislature is to apply."

As our first point we have sought to establish the facts of acute emergency and the radical alteration the entire economic system has experienced. The presence of these two outstanding factors pervades every legal problem raised by the Recovery Legislation, and consideration of them is essential to a sound approach and judgment of its validity. In the light of these facts the policies established in the Recovery Act are definite, "intelligible principles"; clear, "ascertainable standards" and the delegation of power is reasonable.

The declaration of policy is contained in Section 1 of the Act wherein after declaring the existence of an emergency, it is declared to be the policy of Congress, among other things,

"(a) To remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof.

"(b) To provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups.

"(c) To induce and maintain united action of labor and management under adequate governmental sanctions and supervision.

"(d) To eliminate unfair competitive practices.

"(e) To promote the fullest possible utilization of the present productive capacity of industry.

"(f) To avoid undue restriction of production (except as may be temporarily required).

"(g) To increase the consumption of industrial and agricultural products by increasing purchasing power.

"(h) To reduce and relieve unemployment.

"(i) To improve standards of labor.

"(j) Otherwise to rehabilitate industry.

"(k) To conserve natural resources."

A definite standard for the President's action is set forth in Section 3(a) which provides "The President may approve a code or codes of fair competition for the trade or industry." This approval and the exercise of this power, however, is made subject to the following conditions that must be fulfilled. The President must find that—

(1) Such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivision thereof, and

(2) That such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and

(3) That they will tend to effectuate the policy of this title.

The provisions of the code of fair competition to be approved by the President must relate to and carry out the policies of Section 1 of the Act in order to satisfy the provision that the code must tend to effectuate the policy of this title.

The administrative details of the formulation of Codes of Fair Competition for the many diverse industrial and trade groups of this entire country were a task that could not possibly have been handled by legislative bodies. The Congress obviously could not hold hearings, receive evidence, and hear proof for the purpose

of determining the competitive evils of each industry; evaluate those of a major degree of seriousness, the design of proper regulation for their correction and finally submit the result to the test of the conflicting points of view of labor, the producer and consumer before their approval. That this procedure was necessary, due to the varying nature of unfair competition in the diverse industries of the nation is clearly indicated by the different forms of regulations of fair practice contained in the 500 or more codes that were adopted.

Appellant charges the provisions of the statute are vague in the extreme (Brief, p. 26). There is a sharp distinction between vagueness and elasticity. There is a complete difference between general impressions, no matter how vivid their character, and proof developed by evidence and investigation. The Congress could not in advance specify the precise competitive practices it desired to curb. As a matter of fact if it had done so it would have defeated the very purpose of the legislation.

The remaining question is whether Congress has established a policy or standard to guide the President in approving codes. There are at least two indications in the Act of what the codes were to contain. They were to be codes of *fair competition*. This expression is then given substance and meaning by the requirement that such codes "must tend to effectuate the policy of this title," which policy is set forth in Section 1 of the Act.

The phrases "codes of fair competition" and "unfair competitive practices" in conjunction with the declaration of policy contained in the Act and its express purposes, establish definite and certain standards fully equal to those established by such phrases as the following:

"Unfair methods of competition" as used in the Federal Trade Commission Act. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304. It will be noted that the Federal Trade Commission Act contained no indication at all as to

the meaning of "unfair methods of competition." In the Recovery Act Congress sets forth in Section 1 the criteria by which the contents of the "codes of fair competition" were to be determined and required the President to find that the codes conformed to the standards thus established. Congress in the Recovery Act was more definite and specific in setting up a guide post for administrative action than in the Federal Trade Commission Act.

"Just and reasonable rates" as used in the Interstate Commerce Act.

"In the public interest" as used in the Interstate Commerce Act (Section 5, paragraph 2). *New York Central Securities Corporation* v. *United States*, 287 U. S. 12, 24.

"In the interest of the public and the commerce of the people" as used in the Interstate Commerce Act (Section 1, paragraph 15 as amended by Section 402 of the Transportation Act). *Avent* v. *United States*, 266 U. S. 127, 130.

"In the public interest" as used in the Trading with the Enemy Act relating to sales of alien property. *United States* v. *Chemical Foundation*, 272 U. S. 1, 12.

"Public convenience, interest or necessity requires" as used in the Radio Act of 1927 (44 Stat. 1166) as amended by Section 5 of the Act of March 28, 1928 (45 Stat. 373). *Radio Commission* v. *Nelson Brothers Company*, 289 U. S. 266, 285.

Appellant urges that there has been an unconstitutional delegation of power for the reason that trades or industries are said to be empowered to adopt their own codes, a delegation of authority which Congress cannot make. Such an argument does violence to the language of Section 3 of the Act. By Section 3(a) trade or industrial associations or groups may apply to the President to obtain approval of codes of fair competition which he may approve only if he finds the facts showing that they conform to the statutory requirements.

Congress wisely sought to enlist the cooperation of trades and industrial groups and invited them to present to the

President and his advisers their own peculiar problems and pressing needs. In this way much valuable time was saved. But the right of approval, without which the codes could not come into being, was expressly reserved to the President and, as this record shows, he alone exercised it. Industry was constituted a voluntary petitioning group, but the President, subject to the statutory restrictions, was the final arbiter.

Nor is there any delegation of power to non-governmental agencies in the administration of the Code. The determination of the maximum trade-in allowance is subject to the approval of the Administrator (Article IV A(1) of the Code, R. 24). While the National Automobile Dealers Association is designated as the agency to assemble and compile used car sales reports and while various committees or so-called code authorities participate in the administrative detail, no power of decision or compulsion is delegated to these agencies under the Motor Vehicle Retailing Code. Their function is but to suggest or propose, to execute orders of the Administration and to attempt to secure, by persuasion, compliance with code regulations. All powers of decision and compulsion are reserved to the Administration designated by the President as the governmental agency to which he has delegated the administrative powers conferred upon him.

It must be concluded that the standards prescribed by the National Recovery Act are sufficiently definite and certain to meet the test for valid delegation of power as laid down by the decisions of this Court.

D. The Definiteness and Certainty Required in the Definition of Crimes Are Fully Satisfied.

While the National Recovery Act provides for penalties, the sections of the Act delegating to the President the authority to approve codes, need not be stated with the same degree of definiteness and certainty as is required

in a criminal statute. Penalties provided by the Recovery Act do not relate to the provisions delegating authority to the President. The penalties provided in the Act are for a violation of provisions of a Code or regulations issued pursuant to the authority delegated to the President. The requirement for definiteness and certainty in a criminal statute is with respect to the definition of the nature and quality of the crime. Therefore, such requirements of definiteness and certainty relate to the provisions of the Code or the regulations themselves rather than to the provisions of the statute delegating authority to the President to approve codes or prescribe regulations.

In *Champlin Refining Company* v. *Commission*, 286 U. S. 210, it was held that the section of an Oklahoma statute establishing a legislative standard for guidance of the Commission in prorating oil production was valid; although a subsequent section of the act phrased in similar language which sought to define a punishable offense was held to be too vague and indefinite. Here the National Recovery Act prescribes a legislative standard in delegating authority to the President to approve codes of fair competition and for such purposes the standard is sufficiently definite and certain even though similar language might be held too vague and indefinite if the statute were a penal one making it a crime and imposing a penalty upon any one who violated the general rule stated. Under the Recovery Act the Code of Fair Competition approved by the President describes with definiteness and certainty the specific rules of conduct which must be observed by the members of any industry or trade subject to the code of fair competition, the violation of which subjects the violator to penalties. There is no difficulty in determining, upon an examination of the provisions of the Code, whether or not an act constitutes a violation thereof.

Congress may make violations of rules prescribed by administrative officers or commissions a crime. Thus a statute (Transportation Act of 1920, 41 Stat. 456, 474, 476) author-

izing the Interstate Commerce Commission to establish rules in emergencies with regard to car service and making violations of such rules a crime was upheld in *Avent* v. *United States*, 266 U. S. 127. In *United States* v. *Grimaud*, 220 U. S. 506, 522-23, a statute making the violation of rules and regulations prescribed by the Secretary of Agriculture a crime was held valid. The violation of such rule is made a crime not by the administrative officer but by Congress. The statute and not the administrative officer fixes the penalty.

POINT III.

THE MOTOR VEHICLE RETAILING CODE MEETS ALL THE REQUIREMENTS OF THE STATUTES.

There remains for consideration the question whether the Motor Vehicle Retailing Code complies with the requirements of the statutes. Any code adopted must comply with certain procedural requirements, the regulations contained in the Code must be within the meaning of the terms used by the Act, and the Code must not permit monopolies or monopolistic practices. The requirements applicable to the Motor Vehicle Retailing Code are contained in Section 3(a), which reads as follows:

> "Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title; Provided, That such code or codes shall not permit monopolies or monopolistic practices; Provided, that where

such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared."

Section 3(b) makes the provisions of such code, when approved, the standards of fair competition for that trade and any violation thereof is declared to be an unfair method of competition within the meaning of the Federal Trade Commission Act (38 Stat. 719, 15 U. S. C. 45). Provision for the enforcement of codes is made by authorizing injunction suits at the instance of the United States Attorney under the direction of the Attorney General in the several district courts of the United States to enjoin violations of the Code, and by imposing a penalty of $500.00 for each offense in violating a code or a regulation, recoverable upon prosecution and conviction for a misdemeanor (Sections 3 (f) and 10 (a)).

Other provisions of the Act authorize the establishment of such agencies and the utilization of such Federal officers and employees and, with the consent of the State, such State and local officers and employees as may be necessary (Section 2 (a)) and the delegation by the President of his functions and powers under the Act to such officers, agents and employees as he may designate or appoint (Section 2 (b)). The President is also authorized to prescribe rules and regulations necessary to carry out the purposes of the Act (Section 6 (b) and Section 10 (a)).

A. Procedure in Adoption and Approval of the Code Was in Accordance with the Statute.

Section 3(a) authorized the President to approve a Code of Fair Competition for a trade presented by an applicant trade association, upon the following findings:

(a) That the applicant association imposes no inequitable restrictions on admission to membership therein and is truly representative of the trade.

(b) That the Code is not designed to promote monopolies.

(c) That the Code is not designed to eliminate or oppress small enterprises and will not operate to discriminate against them.

(d) That the Code will tend to effectuate the policy of Title I of the Act (the declaration of policy being contained in Section 1).

The section contains two additional provisos which impose conditions upon the approval of codes, namely:

1. That the Code shall not permit monopolies or monopolistic practices.

2. That when such Code affects the services and welfare of persons engaged in other steps of the economic process, nothing in Section 3 (a) shall deprive such person of the right to be heard prior to the approval by the President of such Code. Fulfillment of this proviso manifestly required a public hearing with reasonable notice to permit any interested person an opportunity to be heard. The provisions of Section 6 (b) and Section 10 (a) authorized issuance of regulations which embraced the holding of hearings and the formulation of procedure to be followed in the presentation of Codes and their consideration prior to approval by the President.

Contemporaneously with the signing of the National Recovery Act on June 16, 1933, there was issued Executive Order No. 6173 which is set forth in Appendix C (Vol. 2 p. 15). At the same time the National Recovery Administration published in its Bulletin No. 1 a statement by the

President outlining procedural policy (see Appendix C, Vol. 2, p. 17). On June 19, N.R.A. Bulletin No. 2 was issued for the purposes of disseminating the basic procedure and principles underlying Code making and in that bulletin specific requirements regarding notice, hearings and other procedural matters were stated. (See Appendix C, Vol. 2, p. 22.)

By Executive Order No. 6205-B issued July 15, 1933 (See Appendix C, Vol. 2, p. 16) the rights of persons who had not participated in the hearings establishing a Code, but who were directly affected thereby, were safeguarded by providing for hearings after the approval of the Code. Thus, from the date of the enactment of the National Recovery Act, definite procedural requirements were established and had to be fully complied with in the adoption of Codes of Fair Competition.

The Motor Vehicle Code was submitted, considered and approved in accordance with the procedure outlined above. An application for a Code was submitted August 30, 1933, by the National Automobile Dealers Association which was shown to be representative of the Motor Vehicle Retailing Trade (R. (S) 27-28). Wide publicity was given to the application and the various drafts of the Code. After informal discussions and revisions, a proposed Code was submitted by the Association on September 7, 1933. A public hearing was set for September 18, 1933. This hearing was announced by press release of September 8, 1933, which was given wide publicity (R. (S) 28). A formal notice of hearing was issued (Notice of Hearing No. 99) which was mailed to all persons, firms and organizations known to be interested (R. (S) 29). Such direct notice was given to practically every automobile dealer in the country of whom there were approximately 32,000. This notice was also posted on the official bulletin board of the National Recovery Administration and placed in all United States Post Offices above third class (R. (S) 29). It was also given wide publicity through insertion in Trade Journals (R. (S) 29). A copy of the notice of hearing is set forth in the Find-

ings of Fact (R. (S) 29) and also appears in the affidavits (R. 121). Public hearing was duly held at the time and place specified in the notice and numerous witnesses were heard and evidence and proof was furnished that destructive price cutting in the form of over-allowances granted on trade-ins had caused the breakdown of the economic functions of the industry (R. (S) 31). The evidence submitted and briefs and written statements filed, constituting the record of the hearing, were the basis of a report by the Deputy Administrator who transmitted the final draft of the Code to the Administrator, with the recommendation that the same be approved.

The record as above described contained detailed evidence regarding the competitive abuses in the Motor Vehicle Retailing Trade and particularly the excessive trade-in allowances which had brought about the economic breakdown of the trade. On this subject the report of the Deputy Administrator stated:

> "Unsound trade practices have resulted from the dealers efforts to maintain a satisfactory volume of sales. As the result of these practices, it is claimed that approximately 90 per cent of motor vehicle dealers, employing more than 250,000 workers, are insolvent.
>
> "It may safely be said that practically every motor vehicle dealer has developed, as the result of the highly competitive nature of this business, an increasing tendancy toward an allowance for a prospective customer's old car greater than it can be sold for. This condition has become increasingly serious, and is a ruinous form of price cutting" (R. (S) 33).

The report of the Deputy Administrator contains all of the other required findings. The Deputy Administrator's report was approved by the Administrator who transmitted it, together with the final draft of the Code, to the President with the recommendation that it be approved. The President adopted and approved the report, recommendations

and findings of the Administrator and approved the Code by Executive Order dated October 3, 1933 (R. (S) 36).

The Deputy Administrator's report specifically found that all statutory requirements were complied with in the procedure leading up to the submission of the Code for the President's approval. It also specifically found that the National Automobile Dealers Association was representative of the Trade and required no inequitable restrictions on admission to membership (R. (S) 33, 35).

After discussion of the unsound trade practices prevalent in the industry and the provisions of the Code designed to correct these abuses, the report contained the finding that the Code is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them and will tend to effectuate the policy of Title I of the National Industrial Recovery Act (R. (S) 35).

The Deputy Administrator's report also contains the finding that the Trade was made up of dealers of two classes, namely, the new car dealers and independent used car dealers and that proper representation from both classes of dealers had been provided on all administrative committees.

All of these findings were approved and transmitted by the Administrator to the President, who adopted and approved such report and findings and approved the Code. All requirements of the statute as to findings were thus complied with and the order of approval clearly rested upon the findings so made.

No complaint was made by the plaintiff below that these findings were not supported by the evidence adduced at the public hearings.

The Court below found that the appellant was a member of two trade associations, local and state, both of which were members of the National Association. These local trade associations had participated, with the National As-

sociation, in the submission and sponsorship of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

The Court below also found that the plaintiff has not sought, through any of the agencies established for that purpose, any exemption, modification or stay of the Code. Despite Executive Order No. 6205-B, already referred to (Appendix C, Vol. 2, p. 16), the appellant failed to apply for exemption from, or modification of the Code. Section 3(a) of the National Recovery Act specifically authorizes the President to grant exceptions to and exemptions from the provisions of any code. This administrative remedy should have been utilized by the plaintiff below before it resorted to a suit to enjoin the enforcement of the Code. *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163, 172; *Petersen Baking Company* v. *Bryan*, 290 U. S. 570, 575-76; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463, 465; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 470, 471.

After approval by the President, the Code was given immediate and wide publicity. Printed copies were obtainable from the Office of the National Recovery Administration or from the Superintendent of Public Documents. This Code was No. 46 of the Codes approved pursuant to Section 3(a) of the National Recovery Act. It is published at pages 563-74 of Volume 1 of the National Recovery Administration's publication entitled "Codes of Fair Competition."

B. Trade Practice Provisions of the Motor Vehicle Code Comply with the Terms of the Statute.

The history of the legislation enacted for the purpose of regulating competition clearly indicates that the National Recovery Act is a part of the development of regulatory law required by the increasing complexity of trade and commerce. As has already been pointed out, the Sherman Act, Clayton Act, and Federal Trade Commission Act represent in their respective fields, the exercise of the same power

employed by Congress in the enactment of the Recovery Statute. The earlier statutes are landmarks of the economic conditions that prevailed and that in turn called forth their enactment. The Recovery Statute equally symbolizes the present economic background and necessities that gave it birth. The scope of all this legislation is the field of competitive practices. The radically altered economic system dominated by the acute national emergency, has created competitive evils of different nature and new trends in accordance with its character.

Unfair competitive practices.

This concept of "Unfair Competitive Practices" must be examined therefore in the light of the destructive competitive forces the legislation was intended to curb. It was patently impossible for the Congress, confronted suddenly by new economic conditions, to specifically designate by name or precise description, the destructive competitive practices whose ravages it desired to limit. In the rapidly shifting economic scene, unfair competitive practices of infinite variety waned and developed. The legislative branch of the government could in no sense deal in detail with a situation that required swift action and evaluations. It could, however, and did pursue the procedure it had previously followed in the enactment of the Federal Trade Commission Act. It employed a term which it deemed sufficiently broad and elastic to encompass every serious form of unfair practice.

This Court, in commenting in *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U. S. 304, 310-312, on the procedure followed in the enactment of the Federal Trade Commission Act, said:

> "As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared 'unfair competition' to be unlawful.

> But it was because the meaning which the common law had given to those words was deemed too narrow, that the broader and more flexible phrase 'unfair methods of competition' was substituted. Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not 'admit of precise definition' but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.' "

In like manner, the term "Unfair Competitive Practices," was for the same reason incorporated in the National Recovery Act. It must be presumed that Congress was not simply repeating the prohibition contained in the existing law, but was extending the existing law to meet the conditions that required its enactment.

Indeed, during the Congressional debates on the bill, Congressman Kelly of Pennsylvania, voiced this necessity, saying (Congressional Record, Vol. 77, pp. 4218-19):

> "This industrial recovery act sets up a new meaning for the term 'Fair Competition.' These codes must deal with the fundamental elements of competition under the modern industrial system if they are to carry out the purpose of this Act. The four essentials in any code of fair competition are price, production, wages, and hours.
>
> "There must be agreements as to minimum price. Omit that and the door is open to all the cut-throat competition which has almost destroyed industry. The price must be fair in that it includes a just return to the producer. Establishment of a maximum price will not serve since it would permit destructive competition from that level down to zero. Under it practically all today's evils would flourish.
>
> "The code must contain agreement as to production. We are undertaking to establish a balance between production and consumption. If there is unrestrained production of goods without regard to their consumption, surplus supplies will pile up, with re-

sultant unemployment and chaos. Each industry can work out its apportionment of production to the various units. Without doubt the past performance of each unit will be the yardstick for determining its quota of the production needed to meet the demand. As consumption increases, the production will rise in proportion.

"The code must contain agreements as to wages and hours. These are mandatory under the law and will be vital to the maintenance of fair competition.

"If this measure is enacted, there will be established a new and better definition of fair competition. It will include all the trade practices which have worked out in the past. It will also include within its scope fair prices, fair production, fair wages and fair hours. If that kind of competition can be secured and safeguarded, the economic problem is solved."

See also Appendices D and E (Vol. 2, pp. 28, 50).

The term "unfair competitive practices" as used in the National Recovery Act must therefore be construed as embracing a much broader field than that within the term "unfair methods of competition" as used in the Federal Trade Commission Act.

Codes of fair competition.

In construing the term "Codes of Fair Competition" as used in Section 3 (a), reference should also be had to the competitive conditions existing at the time the statute was enacted and the abuses it was designed to remedy, as briefly recited above. For the reasons there stated the term "Codes of Fair Competition" must be given a broad significance.

Reference should also be had to the trade practice conferences held under the auspices of the Federal Trade Commission and the codes of fair competition approved by the Commission during a long period of years prior to the enactment of the National Recovery Act. The trade practice rules contained in these Commission-approved codes, when

considered in the light of new competitive abuses and the suspension of the anti-trust laws accompanied by the Recovery Act, indicate the nature of the trade practice regulations contemplated by the terms used in the Recovery Act.

Federal Trade Commission Codes Prior to Recovery Act.

The first trade practice conference was held in 1919. By July 1, 1925, there had been some twenty conferences held (Federal Trade Commission Annual Report Year ending June 30, 1926, page 49). In 1926 the Commission established a trade practice conference division (Federal Trade Commission Annual Report Fiscal Year ending June 30, 1926, pages 48-49) and in succeeding years the trade practice conferences were a substantial and important part of the work of the Commission. In its publication entitled "Trade Practice Conferences" under date of June 30, 1933, the Commission states at the opening of the foreword (page vii):

> "Approximately 150 industries have adopted codes of fair competition at trade practice conferences held under the auspices of the Federal Trade Commission acting in the public interest."

The object of these trade practice conferences was to formulate rules governing competitive practices. Such rules after being adopted by representatives of the industry or trade groups were submitted to the Commission for its examination and review following which the Commission would issue such rules as it approved. The rules were divided into two groups, first, those the Commission accepted as rules that could be enforced by the Commission under its existing powers over unfair methods of competition; and, second, those rules accepted as representing the views of the industry to which the Commission had no objection, but which it would not undertake to enforce (Fed-

eral Trade Commission—Trade Practice Conferences, July 1, 1929, pp. 60-61).

There was no specific legislative authority for the formulation and approval of these Codes of Fair Competition (other than the mandate in Section 5 of the Federal Trade Commission Act—to *prevent* unfair methods of competition in commerce).

These Codes were, of course, subject to the limitations and restrictions of the Anti-Trust Acts.

The practice of the Commission in respect to the Trade Practice Conferences and the issuance and approval of Codes of Fair Competition was well known to all important industrial and trade groups in the nation at the time of the enactment of the National Recovery Act. It was equally well known that the efficacy of such proceedings in dealing with abuses arising out of cut-throat competition was considerably restricted by the prohibitions of the Anti-Trust Acts and the lack of concrete affirmative authority in the Federal Trade Commission Act. Therefore, when Congress provided a National Recovery Act for the regulation of business through Codes of Fair Competition and removed the restrictions of the Anti-Trust Acts on regulations contained in and actions pursuant to such codes, it must be concluded that Congress intended to permit not only all rules of the character which had been approved by the Commission, but also additional rules of like character which the Commission had been unable to approve by reason of the restrictions of the Anti-Trust Laws.

This conclusion, likewise, is clearly supported by the Congressional debates. Congressman Kelly, of Pennsylvania, in supporting the proposed Bill on the floor of the House, said (77 Congressional Record, p. 4218):

> "Mr. Chairman, for ten years or more almost every trade and industry has been trying to establish codes of ethics and fair practices which help build business on a better basis. They have met in convention and have earnestly sought to meet the problem of destructive competition in a fair and lawful manner.

"I have been present when some were adopted. I have read more than fifty codes adopted by various trade associations. They are all practically the same and they are all equally impotent. They do not have and they cannot be given, without proper supervision, a weapon powerful enough to do the work required.

"I hold in my hand the code adopted by the fabricators of Ornamental Iron, Bronze, and Wire, approved by the Federal Trade Commission. It provides against the substitution of inferior materials, selling goods below cost with the intent of injuring a competitor, secret rebates, breach of contract with competitors, shipping goods which do not conform to samples, bribing shippers or employees of competitors, discrimination in price between purchasers to create monopoly, obtaining information surreptitiously as to competitors' bids, and so forth.

"All these declarations against unfair practices are but a pious waste as far as results are concerned. Cutthroat competition rages through trades and industries which have adopted these rules.

"What we must have is a real definition of fair competition and an effective plan for securing it in trade and industry."

An examination of the nature of the rules of fair competition approved by the Commission in these earlier codes may, therefore, be of assistance in ascertaining the meaning of the terms used in the Recovery Act and in determining the character and degree of competitive practice regulations permitted by the present Act.

Prior Regulations of trade-in allowances.

While the practice of accepting used articles as a trade-in upon the purchase of new, is not prevalent in many industries or trades, and the occasion therefore for regulation of trade-in allowances would not often arise, a number of rules approved by the Commission related to this subject. Such a rule appears in one of the early trade practice conference rules, namely, that for Band Instrument Manufacturers

adopted under date of September 15, 1924. The preamble* to that Code condemns in vigorous language excessive allowances on used instruments and by Rule 5 of the Code forbids granting allowances in excess of the actual value of the second-hand instruments taken in exchange for the new (Federal Trade Commission—Trade Practice Conferences, July 1, 1929, pp. 44-45).

In the rules adopted by the Steel Office Furniture manufacturing industry, under date of July 25, 1929, Rule 1 (b) requires the publication of allowances made for used office furniture of various makes and models and prohibits the publishing of any false or fictitious allowance for any make or model of used equipment (Ibid, pp. 209-210). References are also made to old machines traded in on new in Rule 11 of the Woodworking Machinery Industry adopted under date of February 11, 1929, and in Rule 10 of the Concrete Mixer and Paving Industry adopted under date of November 21, 1929.

Rules against price discrimination and secret rebates.

Rules against price discrimination and secret rebates had been adopted by many of the trade practice conferences. These rules were, of course, limited by the restrictions of the Anti-Trust laws. The price discrimination rule was limited to such discrimination as would substantially lessen competition or tend to create monopoly. A rule of this character was in force in 25 industries and somewhat simi-

*"Even when no subsidy is involved, the granting of excessive allowances for used instruments taken in exchange is against public interest. It constitutes price discrimination, and is unfair to customers who have no instruments to exchange or who trade in their instruments at a fair valuation. Overallowances are conducive to the development of misleading and improper trade practices, such as quoting fictitiously high prices and making false reductions on new instruments when no used instrument is taken in exchange. Furthermore, a consistent policy of granting overallowances on used instruments leads inevitably to either business failure or to a regular policy of overpricing new instruments to the consequent detriment of the buying public. The evil of granting overallowances is frequently promoted by ignorance of the real value of the instrument taken in exchange and the difficulty of obtaining accurate information on that subject."

lar rules in a number of additional industries. A rule in substantially the following form:

> "The payment or allowance of secret rebates, refunds, credits or unearned discounts whether in the form of money or otherwise, or extending to certain purchasers special services or privileges not extended to all purchasers under like terms and conditions is an unfair trade practice."

was in force in at least 20 industries and variations of the rule were in force in at least 10 others.

A rule against selling goods below cost for the purpose of injuring a competitor or lessening competition was also adopted by 25 industries in substantially a standard form, and additional industries had adopted variations of this rule. There were also a number of rules relating to price publication and maintenance of published prices.

During the fiscal year ending June 30, 1931, by reason of objections having been made that the trade practice conference rules either singly or in combination were countenancing activities contrary to the Anti-Trust Laws, substantially all of the outstanding rules were revised by the Commission and standarized. This general revision materially limited the scope of the rules in order to prevent possible conflict with the Anti-Trust Laws. Their very limitation defines the general outlines of the field covered by the succeeding and present legislation. However, the nature of these rules is significant as indicating the character of trade regulation that might be undertaken with the restrictions of the Anti-Trust Laws removed as has been done by the Recovery Act. In Federal Trade Commission—Trade Practice Conferences—June 30, 1933, are published the revised rules then in effect for some 96 industries. 61 of those industries had a price discrimination rule in a standard form and 7 others had a variation of the rule, 68 of the 96 industries had a rule prohibiting the secret payment or allowance of rebates, refunds, credits or unearned

discounts in a standard form and 5 others had variations of the rule. 64 of the industries had a rule prohibiting selling below cost.

From the foregoing, it is evident that trade regulations substantially identical to those contained in the present Code of Fair Competition for the Motor Vehicle Retailing Trade were adopted in the rules approved by the Federal Trade Commission in connection with their Federal Trade Practice Conferences during a period of many years preceding the enactment of the National Recovery Act. But for the restrictions of the Anti-Trust Laws, the present rules of the Motor Vehicle Code, doubtless could have been approved by the Commission and they are now clearly permissible in view of the exemption from the provisions of the Anti-Trust Acts granted by Section 5 of the National Recovery Act.

Terms of the Recovery Act Have a Broader Meaning Than Those of Federal Trade Commission Act.

It is to be noted that Section 3 (a) of the National Recovery Act provides an affirmative approach to the problem of dealing with competitive practices by establishing rules of *fair* competition, rather than the negative approach followed by the Federal Trade Commission Act and other previous laws in prohibiting *unfair* methods of competition. The prohibitions of the Federal Trade Commission Act, restricted as they were by the anti-trust laws, had failed to prevent the cutthroat competition and other abuses which developed in such serious proportions during the depression. The Recovery Act was enacted to overcome the defects in existing legislation and clearly contemplated the determination according to the peculiar conditions of each industry or trade of what rules were necessary to accomplish fair competition.

In using the term "fair competition" Congress clearly did not intend merely the converse of "unfair methods of competition". Had it so intended it would undoubtedly

have used the phrase already judicially construed. But such a prohibition would merely duplicate an existing statute. It would have made wholly meaningless and unnecessary the exemptions from the anti-trust laws contained in Section 5. The legislative history and the hearings as already indicated show that Congress intended to reach competitive abuses which existing statutes had failed to prevent or correct.

Under the judicial construction of the Federal Trade Commission Act price cutting and selling below cost of production was permissible unless it took the form of price discrimination or was utilized as part of a system to restrain trade or monopolize. Yet "cutthroat" competition was one of the chief abuses developed in the depression and the principal competitive abuse Congress sought to prevent. (See Appendices D and E, Vol. 2, pp. 28, 50.) Thus Congress intended to do more than merely re-enact the Federal Trade Commission Act. It did not intend merely to set up a new machinery to deal with practices already amply provided for. The Act as a whole and its legislative history demonstrate a clear intention to put into operation machinery for prohibiting the practices which had brought about the economic crisis and adequate to deal with them. The Act embodies a new and advanced concept of fair competition.

Therefore, in enacting Section 3 (b) of the National Recovery Act which reads as follows:

> "Sec. 3(b). After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended."

Congress clearly expressed the intention to extend the term "unfair methods of competition" as used in the Federal Trade Commission Act, to include the competitive abuses which the Recovery Act was designed to correct and prevent.

Code Provisions are Permitted by the Recovery Act Even Though Considered Price Regulations.

We definitely contend that the regulations provided in the Motor Vehicle Code are not price fixing measures. However, even if it be assumed for the purposes of argument that they are price fixing, they are warranted by economic conditions and are authorized by the terms of the Recovery Act. Price cutting as a principal factor in the general collapse and breakdown of industry has already been described. The practical impossibility of securing the assumption by trades and industries that were on the verge of bankruptcy of increased costs in the form of higher compensation and shorter working hours for labor (one of the declared purposes of the Act) without some aid in the form of price protection, must also be recognized.

The legislative intent which the Court has constantly recognized and respected, *Federal Trade Commission* v. *R. F. Keppel & Brother, Inc., supra* (see Notes 1, 2 and 3), was clearly expressed. Senator Borah in the course of the debate on June 13, 1933 (77 Congressional Record, p. 5835) interpreted the elimination from the Bill of the prohibition against price fixing by stating: "The Codes may fix prices. I say that for the reason that the clause prohibiting price fixing was stricken out." Senator Wagner said (p. 5838): "We do not want to prevent every possible thing which might be called price fixing. We all agree as to the salutary effects of prohibiting sales below the cost of production. Yet such a prohibition is certainly price fixing." See also Appendix D containing other extracts from the Congressional debates and Appendix E containing extracts from the hearings before the Congressional Committees.

In construing the Act, the entire Statute must be read as a whole. Section 4(b) of the Act contains the statement that price cutting is a definite activity that is directly contrary to the policy of the Act.

The facts and decision in *Appalachian Coals, Inc. v. U. S.*, 288 U. S. 344, foreshadowed the adoption of the Recovery legislation. The condition of ruin this Court found in the Appalachian coal industry was practically paralleled throughout all industry. Unfortunately the cooperation through self-imposed competitive regulation which the Court held permissible in that case could not be accomplished in all industries. There was the uncertainty of the anti-trust laws and how they would be applied in spite of the liberal construction that was made by this Court. This difficulty might have been overcome by the persuasion and pressure of self-preservation. The insurmountable factors, however, were the vast size of many industries and the presence in all industries of the stubborn minority whose unfair competitive tactics made it impossible for the balance of the trade to cooperate. It is this degree of aid that is supplied through the Recovery statutes and by the codes of fair competition.

It, therefore, appears that the scheme of the legislative regulation of industry becomes symmetrical and consistent when viewed in the light of past legislation and present conditions.

C. The Provisions of the Code Do Not Violate the Statutory Prohibition of Section 3A Against Monopoly and Monopolistic Practices.

Price fixing and monopoly are distinct terms and each possesses a completely individual significance. This Court by its decision in *Appalachian Coals, Inc.*, v. U. S., 288 U. S. 344, approved a cooperative association of members of an industry one of the purposes of which was to fix prices and held that it in no sense violated the prohibition contained

in the Sherman Anti-Trust Act against monopoly. The Court there stated, on pages 358 and 360:

> "The plan contemplates that prices are to be fixed by the officers of the Company at its central office. * * *"

The Court concludes:

> "'that only such contracts and combinations are within the act, as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.'"

The term "monopoly and monopolistic practices" clearly does not embrace any of the regulations contained in Article IV of the Motor Vehicle Retailing Code. Monopoly connotes domination by a small group and centralization of control of an entire industry or an important subdivision thereof. Monopolistic practices connote oppression or control by large combinations.

The Motor Vehicle Retailing Trade comprises upwards of 30,000 dealers engaged in the sale of competitive products. The price of the new automobiles is not fixed by the Motor Vehicle dealers but by the manufacturers who publish the factory list price for each car produced. The manufacturers have complete control of the price of their products and they increase or lower prices to meet the competitive forces of fellow manufacturers. The Court has found that "the factory made prices of new cars of different makes is highly competitive." The Code imposes no requirement that compels the owner of a used car to sell it at any particular price and does not compel the dealer who becomes the owner to sell it at any particular price. It is merely a trade practice regulation that applies between a dealer and the prospective purchaser when the purchaser offers an old car as part of the consideration for the new automobile. Even if the provision of the Code might be

deemed a price fixing provision, it would be the fixing of different and varying prices for each of the numerous and distinct makes of cars sold in competition in a highly competitive market. Such prices must be instantly recognized as highly competitive and not as monopolistic prices. It is, therefore, clear that the provisions of the Motor Vehicle Code can in no sense be construed as coming under the prohibition of monopolistic practices set forth in the Act.

The legislative history of the adoption of the proviso prohibiting monopolies and monopolistic practices as a part of the National Recovery Act confirms the conclusion that the regulations here in question and even price fixing, short of monopolistic price fixing, were not prohibited by this proviso. See Appendix D (Vol. 2, pp. 42-49).

POINT IV.

THE STATE STATUTE AND THE CODE DO NOT VIOLATE THE CONSTITUTION OF THE STATE OF NEW YORK.

The questions relating to due process and delegation of power arising under the State Constitution are substantially similar in principle to those already discussed in Point II as arising under the Federal Constitution. The principal point remaining for consideration under the State Constitution is whether the State statute and the Code conflict with Section 17 of Article III of the New York Constitution. Inasmuch as a separate brief will be submitted by the Attorney General of the State of New York in which the State constitutional questions will be fully discussed, only a brief statement is made herein on that point.

While there has been no decision by the Court of Appeals, the question has been presented in a number of cases, some of which have reached the Appellate Division, and a determination of the question by the Court of Appeals may

be anticipated in the near future. The constitutionality of the State Act has been raised and determined by the Appellate Division on three occasions. *Gross* v. *Jamaica Auction Galleries, Inc.*, 242 App. Div. 658; *Sherman* v. *Abeles*, 241 App. Div. 676; and *Sabatini* v. *Andrews*, 276 N. Y. S. 502. In each and every case the Appellate Court has sustained the constitutionality of the State Act without qualification.

In *Sherman* v. *Abeles*, supra, the question "No. 5. Does Chapter 781 of the Laws of 1933 of the State of New York, violate the Constitution of the State of New York?" was certified to the Court of Appeals, but as the case was reversed on other grounds, it was not answered. *Sherman* v. *Abeles*, 265 N. Y. 383.

The case of *Darweger* v. *Staats*, 153 Misc. 522, cited and quoted by the appellant, was the decision of a Court of original jurisdiction. It is one of the very few decisions of the lower courts that has not sustained the Act. We have just been advised that the decision of the trial Court has been affirmed by the Appellate Division.

Section 17 of Article III of the New York State Constitution is not even applicable to the present case. The language of Section 17 of the State Constitution prohibits the incorporation by reference "of any existing law or any part thereof." The appellant does not contend that the Codes of Fair Competition are law. It is conceded they are not, but are regulations that "have the same force and effect as law." It is pointed out that even the Code as a regulation is not incorporated by reference. The State Recovery Act does no more than designate a single agency common to the Federal Government that may adopt rules and regulations in the form of Codes. These Codes only after their adoption by the agency may be filed under the terms of the statute.

The cases cited in the appellant's brief in support of its contention that the State Act violates Article III, Section 17

of the State Constitution in each instance limits the prohibition to the incorporation by reference to statute law.

In *People ex rel. N. Y. Electric Lines Co.* v. *Squire*, 107 N. Y. 593, at page 602:

> "The object and intent of the constitutional provision was to *prevent statute laws* relating to one subject from being made applicable to laws passed upon another subject, through ignorance and misapprehension on the part of the legislature * * *"

In *People ex rel. Commissioner* v. *Banks*, 67 N. Y. 568, at page 775:

> "The evil in view in adopting this provision of the Constitution was the incorporating into acts of the legislature by *reference to other statutes* of clauses and provisions of which the legislators might be ignorant * * *"

This applies in like manner to the citations of sister States. In the case of *State* v. *Intoxicating Liquors*, 121 Maine 483, in which the State of Maine by reference adopted the *Act of Congress* (see Appellant's Brief, bottom page 83 and 84), *Opinion of Justices*, 239 Mass. 606:

> "One distinguishing characteristic of that bill is that in several sections it incorporates by reference *laws made and to be made by the Congress* of the United States * * *"

The only additional question which arises under the State Act is whether there is any objection to the State delegating administrative powers to Federal agencies. In other words, is the New York Act invalid because the power to formulate and approve Codes to be in effect in the State of New York has been delegated to the National Recovery Administration?

The use of Federal administrative agencies to carry out the state legislative purpose would seem to be entirely

unobjectionable. The process of code adoption has been described, and shows that creation of distinct and separate agencies would involve an arduous and highly unnecessary duplication and possible confusion. The United States Supreme Court has on several occasions sustained federal legislation utilizing state agencies for its administration. See *Holmgren* v. *United States*, 217 U. S. 509. In *Arver* v. *United States*, 245 U. S. 366 at 389, the Supreme Court summarily dismissed as "too wanting in merit to require further notice" the contention that an act was void because it delegated to State officials federal power.

The final determination of whether a State statute is in accordance with the State Constitutions must be made by the highest Court of the State. *Louis K. Liggett Co.* v. *J. M. Lee, Comptroller*, decided March 13, 1933, No. 301. *Lee* v. *Bickel*, No. 44, decided May 21, 1934. *Hartford Accident & Indemnity Co.* v. *Nelson Manufacturing Co.*, 291 U. S. 352. *Glenn* v. *Field Packing Co.*, No. 541, decided December 4, 1933.

This Court has frequently stated its reluctance to pass upon such questions in advance of the decision of the highest Court of the State. *Pelton* v. *National Bank*, 101 U. S. 143. *Louisville & Nashville National Railroad* v. *Jarrett*, 231 U. S. 298. *Terrace* v. *Thompson*, 263 U. S. 197. *Porter* v. *Investors Syndicate*, 287 U. S. 346. *Carstairs* v. *Cochran*, 193 U. S. 10.

Stripped of rhetoric, the appellant places great emphasis on the penalties provided by the statute for violation of the Code in order to eloquently describe the Code as a "penal statute" and concludes that the Act violated the State Constitution as it incorporates by reference a "penal statute." The Sanitary Code, whose right to incorporation by reference is indisputable, provides punishments of imprisonment not exceeding one year "or by a fine not exceeding $2,000.00 or both." (See Sanitary Code, Section 224 and Section 1740 of the Penal Law of the State of New

York.) It appears therefore that the violation of the Sanitary Code provides penalties and punishments far more drastic than those established by the State Recovery Act for a violation of the Code of Fair Competition. It cannot be contended, therefore, that by reason of the penalties provided, the codes of fair competition are in any sense "penal statutes."

The law is well settled by the Courts of New York that only as a last resort, after exhausting every resource afforded by the canons of interpretation to save the Statute, will it be denounced by the Courts as unconstitutional. The State Courts will, in their construction, if possible, place such a meaning on the Act and the constitutional provision that both may operate in harmony. *Sage* v. *Brooklyn,* 89 N. Y. 189; *Annotations in McKinney's State Constitution; People* v. *Lorillard,* 185 N. Y. 285; *People* v. *Banks,* 67 N. Y. 568; *People* v. *Davis,* 78 App. Div. 750; Section 1210 of Article 47 of the Documentary Law. *Watkinson* v. *Hotel Pennsylvania,* 195 A. D. 624; Sections 241 to 243 of the General Business Law.

LOWER COURT DECISIONS.

The appellant refers (Brief pp. 20-23, 44-45, 52, 64-70, 77) to a number of lower court decisions which have been adverse to the regulation sought to be enforced under the National Recovery Act. Most of these adverse decisions are based upon the proposition that the particular transaction in question was not interstate commerce or did not sufficiently affect interstate commerce to be within the Federal regulatory power. A tabulation of all cases decided by the lower courts indicates clearly that the Recovery legislation and the Codes have been sustained on many more occasions than they have met defeat.

The following are examples of cases sustaining the Recovery legislation that have already been reported: *United States v. McAlister,* 8 F. (Supp.) 529; *Richmond Hosiery*

Mills v. Camp, 7 F. (Supp. 129; affirmed C. C. A., 74 Fed. (2d) 200; *U. S. v. Canfield Lumber Company*, 7 F. (Supp.) 694; *United States v. Spotless Dollar Cleaners*, 6 F. (Supp.) 725; *United States v. Schechter*, 8 F. (Supp.) 136; *United States v. French*, 9 F. (Supp.) 30; *United States v. Calistan Packers*, 4 F. (Supp.) 696; *United States v. Spissler*, 7 F. (Supp.) 123. Many additional favorable decision were issued without opinion or the opinions have not yet been reported.

As of March 2, 1935, in the Federal Courts there have been disposed of a total of 224 cases under the National Recovery Act exclusive of cases arising under section 9 thereof. Of these cases 193 were disposed of favorably to the Government and 31 unfavorably.

The cases fall into the following classifications:

Criminal cases: favorable to the Government, 31; against, 3.

Equity cases: favorable to the Government, 142 (consent decrees, 106); against, 17.

Suits by private parties: favorable to the Government, 20; against, 11.

The Motor Vehicle Retailing Code has been sustained in about sixty odd cases presented in the civil and criminal New York State Courts of original jurisdiction, more particularly in the several counties of New York, Kings, Queens, Nassau and Westchester.

Respectfully submitted,

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Attorneys for Appellee.

STANLEY OSSERMAN,
EUGENE ROTH,
BURTON A. ZORN,
on the Brief.

March 6, 1935.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES COMPANY, *Appellant*,

vs.

WILLIAM C. DODGE, District Attorney, *Appellee*.

BRIEF OF APPELLEE.

VOLUME II.

APPENDIX.

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March 6, 1935.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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VOLUME II.

APPENDIX.

APPENDIX A.

Extracts from the National Industrial Recovery Act Public No. 67, 73d Congress.. 48 Stat. 195.

AN ACT to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

INDUSTRIAL RECOVERY

DECLARATION OF POLICY

Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of

the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

ADMINISTRATIVE AGENCIES

Sec. 2. (a) To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the provisions of the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed.

(b) The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title.

(c) This title shall cease to be in effect and any agencies established hereunder shall cease to exist at the expiration of two years after the date of enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended.

Codes of Fair Competition

Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided Further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

(c) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district at-

torneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

(d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.

(e) On his own motion, or if any labor organization, or any trade or industrial organization, association, or group, which has complied with the provisions of this title, shall make complaint to the President that any article or articles are being imported into the United States in substantial quantities or increasing ratio to domestic production of any competitive article or articles and on such terms or under such conditions as to render ineffective or seriously to endanger the maintenance of any code or agreement under this title, the President may cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this subsection, and if, after such investigation and such public notice and hearing as he shall specify, the President shall find the existence of such facts, he shall, in order to effectuate the policy of this title, direct that the article or articles concerned shall be permitted entry into the United States only upon such terms and conditions and subject to the payment of such fees and to such limitations in the total quantity which may be imported (in the course of any specified period or periods) as he shall find it necessary to prescribe in order that the entry thereof shall not render or tend to render ineffective any code or agreement made under this title. In order to enforce any limitations imposed on the total quantity of imports, in any specified period or periods, of any article or articles under this subsection, the President may forbid the importation of such article or articles unless the importer shall have first obtained from

the Secretary of the Treasury a license pursuant to such regulations as the President may prescribe. Upon information of any action by the President under this subsection the Secretary of the Treasury shall, through the proper officers, permit entry of the article or articles specified only upon such terms and conditions and subject to such fees, to such limitations in the quantity which may be imported, and to such requirements of license, as the President shall have directed. The decision of the President as to facts shall be conclusive. Any condition or limitation of entry under this subsection shall continue in effect until the President shall find and inform the Secretary of the Treasury that the conditions which led to the imposition of such condition or limitation upon entry no longer exists.

(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

AGREEMENTS AND LICENSES

Sec. 4. (a) The President is authorized to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce, and will be consistent with the requirements of clause (2) of subsection (a) of section 3 for a code of fair competition.

(b) Whenever the President shall find that destructive wage or price cutting or other activities contrary to the policy of this title are being practiced in any trade or industry or any subdivision thereof, and, after such public notice and hearing as he shall specify, shall find it essential to license business enterprises in order to make effective a code of fair competition or an agreement under this title or otherwise to effectuate the policy of this title, and shall publicly so announce, no person shall, after a date fixed in

such announcement, engage in or carry on any business, in or affecting interstate or foreign commerce, specified in such announcement, unless he shall have first obtained a license issued pursuant to such regulations as the President shall prescribe. The President may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the President suspending or revoking any such license shall be final if in accordance with law. Any person who, without such a license or in violation of any condition thereof, carries on any such business for which a license is so required, shall, upon conviction thereof, be fined not more than $500, or imprisoned not more than six months, or both, and each day such violation continues shall be deemed a separate offense. Notwithstanding the provisions of section 2 (c), this subsection shall cease to be in effect at the expiration of one year after the date of enactment of this Act or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended.

Sec. 5. While this title is in effect (or in the case of a license, while section 4 (a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States.

(a) Nothing in this Act, and no regulation thereunder, shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this Act, or regulation thereunder, prevent anyone from marketing or trading the produce of his farm.

Limitations Upon Application of Title

Sec. 6. (a) No trade or industrial association or group shall be eligible to receive the benefit of the provisions of this title until it files with the President a statement containing such information relating to the activities of the association or group as the President shall by regulation prescribe.

(b) The President is authorized to prescribe rules and regulations designed to insure that any organization availing itself of the benefits of this title shall be truly representative of the trade or industry or subdivision thereof represented by such organization. Any organization violating any such rule or regulation shall cease to be entitled to the benefits of this title.

(c) Upon the request of the President, the Federal Trade Commission shall make such investigations as may be necessary to enable the President to carry out the provisions of this title, and for such purposes the Commission shall have all the powers vested in it with respect of investigations under the Federal Trade Commission Act, as amended.

Sec. 7. (a) Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

(b) The President shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry or subdivision thereof with respect to which the conditions referred to in clauses (1) and (2) of subsection (a) prevail, to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President under subsection (a) of section 3.

(c) Where no such mutual agreement has been approved by the President he may investigate the labor practices, policies, wages, hours of labor, and conditions of employment in such trade or industry or subdivision thereof; and upon the basis of such investigations, and after such hearings as the President finds advisable, he is authorized to prescribe a limited code of fair competition fixing such maximum hours of labor, minimum rates of pay, and other conditions of employment in the trade or industry or subdivision thereof investigated as he finds to be necessary to effectuate the policy of this title, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of section 3. The President may differentiate according to experience and skill of the employees affected and according to the locality of employment; but no attempt shall be made to introduce any classification according to the nature of the work involved which might tend to set a maximum as well as a minimum wage.

(d) As used in this title, the term "person" includes any individual, partnership, association, trust, or corporation; and the terms "interstate and foreign commerce" and "interstate or foreign commerce" include, except where otherwise indicated, trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

* * * * * * * *

RULES AND REGULATIONS

SEC. 10. (a) The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this title, and fees for licenses and for filing codes of fair competition and agreements, and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500 or imprisonment for not to exceed six months, or both.

(b) The President may from time to time cancel or modify any order, approval, license, rule, or regulation issued under this title; and each agreement, code of fair competition, or license approved, prescribed, or issued under this title shall contain an express provision to that effect.

* * * * * * * *

Separability Clause

Sec. 303. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Short Title

Sec. 304. This Act may be cited as the "National Industrial Recovery Act."

Approved June 16, 1933, 11:55 a. m.

APPENDIX B.

New York Statute.

LAWS of 1933, Chapter 781.

(Effective August 26, 1933.)

Purpose.

AN ACT to provide for codes of fair competition for trades, industries and subdivisions thereof, agreements, licenses, rules and regulations pursuant to the provisions of the National Industrial Recovery Act, enacted by the congress of the United States effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state.

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:—

Section 1. Legislative finding; statement of policy.—A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the State of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the People of the State of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the National Industrial Recovery Act, enacted by the Congress of the United States, effective June sixteenth, nineteen hundred thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to co-operate in the furtherance of the objects and purposes declared in said

act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said National Industrial Recovery Act which are applicable in interstate commerce in the state of New York.

Section 2. Filing of Codes and Agreements.—1. The Secretary of State is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each Code, agreement, license, rule or regulation in effect pursuant to such act of the congress, pertaining, effecting or in any way relating to the conduct of business in the state and duly certified as a true copy of such document or documents by the officials in charge of the administration of the provisions of title one of the said National Industrial Recovery Act or by their duly authorized agents. Upon such filing of a copy so certified of a Code of Fair competition for any trade, industry or subdivision thereof, as approved by the President of the United States, or of any agreement or license or of any rule or regulation provided for under title one of the said National Industrial Recovery Act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, and any violation of any provision of such code, agreement, license, rule or regulation shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense, and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.

2. The Secretary of State shall cause to be printed a sufficient number of copies of each such code, agreement, license, rule or regulation and the same shall be kept available for distribution upon request therefor.

3. If in any such code, agreement, license, rule or regulation, power is conferred upon any person, or group of persons to subpoena witnesses, compel the production of books, papers and records, the attendance of witnesses or to take their testimony, a like power shall be deemed to have vested in such person or group of persons with regard to matters and things of a wholly intrastate character.

Section 3. Jurisdiction of Court.—The Supreme Court of the State of New York is hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition, agreement, license, rule or regulation, filed pursuant to this act, and to prevent and restrain the commission within this state of any act tending to defeat or hamper the operation and effectiveness, within the state of such act of the congress *at the instance of any party whose interests are or may be adversely affected by such violations or acts.* Nothing in this section contained, however, shall in anywise affect the criminal liability for violations of such codes, agreements, licenses, rules or regulations. Provided, however, that nothing in this act shall be construed by any public official or court as declaring illegal the right of workers to organize; to adopt a constitution and by-laws and enforce the same and the right to control and direct the members of such organization in accordance with such constitution and by-laws; that no provision of this act shall be construed to compel workers or employees to continue at their work; or to declare an act illegal of an organization to collectively cease work; or its officers directing the cessation of work of its members.

Section 4. Products of Individual Labor.—Nothing in this act shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this act prevent anyone from marketing or trading the produce of his farm.

Section 5. Exemption from Anti-Trust Laws; Application of Labor Laws.—While this act is in effect and for sixty days thereafter, any Code, agreement, license, rule or regulation in effect under this act, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of article twenty-two of the general business law, or of any other provisions of law, to the extent that such provisions of law are inconsistent with the provisions of such code, agreement, license, rule or regulation. Nothing in this act contained, however, shall be construed in any way to alter, modify or affect the provisions of existing laws of this state in such manner as to permit any change in public utility rates except with the permission and approval of the public service commissioner or as to lower the standards therein provided with regard

to labor, hours of labor, wages for labor and employment of females and children.

Section 6. Effect of Issuance, Suspension or Revocation of Licenses.—1. The license required of and obtained by any person pursuant to paragraph (b) of section four of said act of the Congress shall be deemed to include business engaged in or carried on by him of a wholly intrastate character, and with respect thereto such person shall be subject to all the terms and conditions expressed therein and shall be entitled to all the privileges and immunities granted thereby.

2. The failure to obtain such a license or the suspension or revocation by the President of the United States of any such license shall preclude such person from engaging in or carrying on any business of a wholly intrastate character.

3. Any person who engages in or carries on any business in this state in violation of sub-division two of this section shall upon conviction thereof be fined not more than five hundred dollars and for each day such violation continues a separate offense, subject to the fine herein prescribed, shall be deemed to have been committed.

Section 7. Letting of Public Contracts.—Every department, board, bureau, agency, authority, commission, public body or officer of the state or of any political subdivision thereof or district therein charged with the duty of letting or awarding contracts for (a) the construction, alteration, or repair of public works or (b) the purchasing of materials or supplies, shall, notwithstanding any inconsistent provision of law, let or award such contracts only to such persons or corporations, otherwise qualified, who or which will agree in and by the terms of such contract to use or supply only articles, materials and supplies which have been been or will be mined, produced, manufactured or supplied, as the case may be, by a person or corporation who or which is a party or subject to a code of fair competition, agreement or license, approved, prescribed or issued under the said National Industrial Recovery Act for the trade, industry or subdivision thereof mining, producing, manufacturing or supplying such articles, materials and supplies.

Section 8. Duration.—This act, in so far as it affects agreements, codes, rules or regulations, shall become ineffective contemporaneously with the expiration of said

National Industrial Recovery Act, provided for by section two (c) of said Act, and in so far as it affects licenses, contemporaneously with the expiration of the said National Industrial Recovery Act, as provided for in section four (b) of said Act.

Section 9. Effect of Partial Invalidity.—If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of this act, and the application of the provisions thereof to other persons or circumstances, shall not be affected thereby.

APPENDIX C.

Executive Orders and NRA Bulletins.

EXECUTIVE ORDER NO. 6173.

ADMINISTRATION FOR INDUSTRIAL RECOVERY.

Pursuant to the authority of "AN ACT TO encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate the policy set forth in Title I—Industrial Recovery—of said act:

1. I hereby appoint Hugh Johnson to be the Administrator for Industrial Recovery under said Title I of said Act.

2. I hereby appoint a Special Industrial Recovery Board to be composed of the following members: The Secretary of Commerce, Chairman: the Attorney General: the Secretary of the Interior: the Secretary of Agriculture: the Secretary of Labor: the Director of the Budget; the Administrator for Industrial Recovery; the Chairman of the Federal Trade Commission.

The Administrator during the ensuing 30 days shall have authority, subject to the general approval of the Special Industrial Recovery Board, to appoint the necessary personnel on a temporary basis to conduct hearings and to do such other and necessary work as authorized under Title I of said Act.

FRANKLIN D. ROOSEVELT.

The White House,
June 16, 1933.

EXECUTIVE ORDER NO. 6205-A.

Pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933, and in supplement to my Executive Order of June 16, 1933, appointing Hugh S. Johnson to be the Administrator for Industrial Recovery under Title I of said Act, and appointing a Special Industrial Recovery Board, I hereby authorize the Administrator, subject to the general approval of the Special Industrial Recovery Board, to appoint the necessary personnel on a permanent basis, to fix their compensation, and to conduct such hearings and to exercise

such other functions as are vested in me by Title I of said Act, except the approval of codes, or making of agreements, or issuance of licenses, or exercise of powers conferred in Section 3 (e), Section 6 (c), Section 8 (b), Section 9, and Section 10.

FRANKLIN D. ROOSEVELT.

The White House,
July 15, 1933.

EXECUTIVE ORDER NO. 6205-B.

Pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933.

I hereby prescribe the following regulation, modifying any previous order inconsistent therewith:

Any code of fair competition approved by me shall be deemed in full force and effect on the effective date as stated in the code: but after the approval of a code and as an incident to the immediate enforcement thereof, hearings may be given by the Administrator or his designated representative to persons (hereby defined to include natural persons, partnerships, associations or corporations) who have not in person or by a representative participated in establishing or consenting to a code, but who are directly affected thereby, and who claim that application of the code in particular instances are unjust to them and who apply for an exception to, or exemption from, or modification of the Code. Such persons so applying within ten days after the effective date of the code, shall be given an opportunity for a hearing and determination of the issues raised prior to incurring any liability to enforcement of the code, and the Administrator shall, if justice requires, stay the application of the code to all similarly affected pending a determination by me of the issues raised.

Approval Recommended:
HUGH S. JOHNSON.

FRANKLIN D. ROOSEVELT.

The White House
July 15, 1933.

Bulletin No. 1—June 16, 1933

The law I have just signed was passed *to put people back to work*—to let them buy more of the products of farms and factories and start our business at a living rate again. This task is in two stages—first, to get many hundreds of thousands of the unemployed back on the pay roll by snowfall and second, to plan for a better future for the longer pull. While we shall not neglect the second, the first stage is an emergency job. It has the right of way.

The second part of the act gives employment by a vast program of public works. Our studies show that we should be able to hire many men at once and to step up to about a million new jobs by October 1, and a much greater number later. We must put at the head of our list those works which are fully ready to start now. Our first purpose is to create employment as fast as we can but we should not pour money into unproved projects.

We have worked out our plans for action. Some of it will start tomorrow. I am making available $400,000,000 for State roads under regulations which I have just signed and I am told that the States will get this work under way at once. I have also just released over $200,000,000 for the Navy to start building ships under the London treaty.

In my inaugural I laid down the simple proposition that nobody is going to starve in this country. It seems to me to be equally plain that no business which depends for existence on paying less than living wages to its workers has any right to continue in this country. By "business" I mean the whole of commerce as well as the whole of industry; by workers I mean all workers—the white-collar class as well as the men in overalls; and by *living* wages I mean more than a bare subsistence level—I mean the wages of *decent* living.

Throughout industry, the change from starvation wages and starvation employment to living wages and sustained employment can, in large part, be made by an industrial covenant to which all employers shall subscribe. It is greatly to their interest to do this because decent living, widely spread among our 125,000,000 people eventually means the opening up to industry of the richest market which the world has known. It is the only way to utilize

the so-called excess capacity of our industrial plants. This is the principle that makes this one of the most important laws that ever came from Congress because, before the passage of this act, no such industrial covenant was possible.

On this idea, the first part of the act proposes to our industry a great spontaneous cooperation to put millions of men back in their regular jobs this summer. The idea is simply for employers to hire more men to do the existing work by reducing the work-hours of each man's week and at the same time paying a living wage for the shorter week.

No employer and no group of less than all employers in a single trade could do this alone and continue to live in business competition. But if *all* employers in each trade now band themselves faithfully in these modern guilds—without exception—and agree to act together and at once, none will be hurt and millions of workers, so long deprived of the right to earn their bread in the sweat of their labor, can raise their heads again. The challenge of this law is whether we can sink selfish interest and present a solid front against a common peril.

It is a challenge to industry which has long insisted that, given the right to act in unison, it could do much for the general good which has hitherto been unlawful. From today it has that right.

Many good men voted this new charter with misgivings. I do not share these doubts. I had part in the great cooperation of 1917 and 1918 and it is my faith that we can count on our industry once more to join in our general purpose to lift this new threat and to do it without taking any advantage of the public trust which has this day been reposed without stint in the good faith and high purpose of American business.

But industry is challenged in another way. It is not only the slackers within trade groups who may stand in the path of our common purpose. In a sense these groups compete with each other, and no single industry, and no separate cluster of industries, can do this job alone, for exactly the same reason that no single employer can do it alone. In other words, we can imagine such a thing as a *slacker industry.*

This law is also a challenge to labor. Workers, too, are here given a new charter of rights long sought and hitherto denied. But they know that the first move expected by the Nation is a great cooperation of all employers, by one single mass action, to improve the case of workers on a scale never attempted in any nation. Industries can do this only if they have the support of the whole public and especially of their own workers. This is not a law to foment discord and it will not be executed as such. This is a time for mutual confidence and help and we can safely rely on the sense of fair play among all Americans to assure every industry which now moves forward promptly in this united drive against depression that its workers will be with it to a man.

It is, further, a challenge to administration. We are relaxing some of the safeguards of the antitrust laws. The public must be protected against the abuses that led to their enactment, and to this end we are putting in place of old principles of unchecked competition some new Government controls. They must above all be impartial and just. Their purpose is to free business—not to shackle it—and no man who stands on the constructive forward-looking side of his industry has anything to fear from them. To such men the opportunities for individual initiative will open more amply than ever. Let me make it clear, however, that the antitrust laws still stand firmly against monopolies that restrain trade and price fixing which allows inordinate profits or unfairly high prices.

If we ask our trade groups to do that which exposes their business, as never before, to undermining by members who are unwilling to do their parts, we must guard those who play the game for the general good against those who may seek selfish gains from the unselfishness of others. We must protect them from the racketeers who invade organizations of both employers and workers. We are spending billions of dollars and if that spending is really to serve our ends it must be done quicky. We must see that our haste does not permit favoritism and graft. All this is a heavy load for any Government and one that can be borne only if we have the patience, cooperation, and support of people everywhere.

Finally, this law is a challenge to our whole people. There is no power in America that can force against the public will such action as we require. But there is no group in America that can withstand the force of an aroused public opinion. This great cooperation can succeed only if those who bravely go forward to restore jobs have aggressive public support and those who lag are made to feel the full weight of public disapproval.

As to the machinery—the practical way of accomplishing what we are setting out to do, when a trade association has a code ready to submit and the association has qualified as truly representative, and after reasonable notice has been issued to all concerned, a public hearing will be held by the Administrator or a deputy. A Labor Advisory Board appointed by the Secretary of Labor will be responsible that every affected labor group, whether organized or unorganized, is fully and adequately represented in an advisory capacity and any interested labor group will be entitled to be heard through representatives of its own choosing. An Industrial Advisory Board appointed by the Secretary of Commerce will be responsible that every affected industrial group is fully and adequately represented in an advisory capacity and any interested industrial group will be entitled to be heard through representatives of its own choosing. A Consumers' Advisory Board will be responsible that the interests of the consuming public will be represented and every reasonable opportunity will be given to any group or class who may be affected directly or indirectly to present their views.

At the conclusion of these hearings and after the most careful scrutiny by a competent economic staff the Administrator will present the subject to me for my action under the law.

I am fully aware that wage increases will eventually raise costs, but I ask that managements give first consideration to the improvement of operating figures by greatly increased sales to be expected from the rising purchasing power of the public. That is good economics and good business. The aim of this whole effort is to restore our rich domestic market by raising its vast consuming capacity. If we now inflate prices as fast and as far as we increase wages, the whole project will be set at naught. We cannot

hope for the full effect of this plan unless, in these first critical months, and, even at the expense of full initial profits, we defer price increases as long as possible. If we can thus start a strong sound upward spiral of business activity our industries will have little doubt of black-ink operations in the last quarter of this year. The pent-up demand of this people is very great and if we can release it on so broad a front, we need not fear a lagging recovery. There is greater danger of too much feverish speed.

In a few industries, there has been some forward buying at unduly depressed prices in recent weeks. Increased costs resulting from this Government-inspired movement may make it very hard for some manufacturers and jobbers, to fulfill some of their present contracts without loss. It will be a part of this wide industrial cooperation for those having the benefit of these forward bargains (contracted before the law was passed) to take the initiative in revising them to absorb some share of the increase in their suppliers' costs, thus raised in the public interest. It is only in such a willing and considerate spirit, throughout the whole of industry, that we can hope to succeed.

Under Title I of this Act, I have appointed Hugh Johnson as Administrator and a special Industrial Recovery Board under the chairmanship of the Secretary of Commerce. This organization is now prepared to receive proposed codes and to conduct prompt hearings looking toward their submission to me for approval. While acceptable proposals of no trade group will be delayed, it is my hope that the 10 major industries which control the bulk of industrial employment can submit their simple basic codes at once and that the country can look forward to the month of July as the beginning of our great national movement back to work.

During the coming 3 weeks Title II relating to public works and construction projects will be temporarily conducted by Col. Donald H. Sawyer as Administrator and a special temporary board consisting of the Secretary of the Interior as chairman, the Secretary of Commerce, the Secretary of Agriculture, the Secretary of War, the Attorney General, the Secretary of Labor, and the Director of the Budget.

During the next 2 weeks the Administrator and this board will make a study of all projects already submitted

or to be submitted and, as previously stated, certain allotments under the new law will be made immediately.

Between these twin efforts—public works and industrial reemployment, it is not too much to expect that a great many men and women can be taken from the ranks of the unemployed before winter comes. It is the most important attempt of this kind in history. As in the great crisis of the World War, it puts a whole people to the simple but vital test: *"Must we go on in many groping, disorganized, separate units to defeat or shall we move as one great team to victory?"*

Bulletin No. 2—June 19, 1933.

BASIC CODES OF FAIR COMPETITION

(1) This bulletin is intended to inform all trade associations, industrial and labor groups how to proceed to secure the benefits of the National Industrial Recovery Act. In his statement upon the signing of the act, the President said with reference to prompt submission of codes of fair competition:

This organization is now prepared to receive proposed codes and to conduct prompt hearings looking toward their submission to me for approval. While acceptable proposals of no trade group will be delayed it is my hope that the 10 major industries which control the bulk of industrial employment can submit their simple basic codes at once and that the country can look forward to the month of July as the beginning of our great national movement back to work.

This bulletin covers the procedure necessary to comply with the President's suggestion.

(2) The National Recovery Administration will receive proposed codes at any time after this date at its office in the Department of Commerce Building, Washington, D. C. Codes may be submitted by mail and will be promptly examined and associations or groups submitting them will be given such suggestions as are appropriate for further action. Consistent with the President's statement, the major industries will so far as practical have the first attention of the Administrator.

As soon as the proposed code is put in proper form, after consultation with those submitting it, due public notice will be given of a date for a hearing on the code, and at such hearing a reasonable opportunity to be heard will be given to all interested parties, including all affected labor groups, and representatives of consumer organizations, the trade associations or groups submitting codes and any essential minority thereof, other concerns not members thereof, and persons engaged in other steps of the economic process whose service and welfare might be affected by the approval of the proposed code. This hearing will be held by a person designated by the Administrator and there will be present, to advise that person, experts in the industry under consideration and the labor pertaining thereto, who will be chosen under the supervision of the Secretaries of Commerce and Labor, respectively. All other persons or concerns whose cooperation is desirable in connection with the proposed code shall be entitled to attend such hearings.

(3) After such a hearing the proposed code may be modified at the suggestion of the Administration or otherwise and as so modified, if it is agreed to by representatives of the association or group presenting it and ratified by such association or group under such conditions as the Administration may prescribe, it will be presented to the President for his approval or disapproval or suggested modification, and when finally approved by the President, it shall have the effect prescribed by the National Industrial Recovery Act.

(4) In order to carry out the President's suggestion as quoted in paragraph (1) and to effect an immediate reduction of unemployment and increase of mass purchasing power, trade associations or groups are invited to submit without delay a basic code covering only such agreements as are consistent with the policy of the act, respecting maximum hours of labor, minimum rates of wages, and such means as each industry may find necessary to protect its constructive and cooperating majority from the wasteful and unfair competition of minorities or recalcitrants. Additions, modifications, and refinements of such basic codes will be considered later upon application by such associations or groups.

(5) The act requires that certain provisions found in subsection (a) of section 7 shall be included in every code and

therefore no application for the approval of any basic code will be received which omits or modifies these mandatory provisions, which are as follows:

Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, maximum machine-load of employees, and other conditions of employment, approved or prescribed by the President.

(6) *It is not the function of the National Recovery Administration to prescribe what shall be in the codes to be submitted by associations or groups. The initiative in all such matters is expected to come from within the industry itself.* Neither it is the purpose of the Administration to compel the organization of either industry or labor. Basic codes containing provisions respecting maximum hours of labor, minimum rates of pay, and other conditions of employment, which are in themselves satisfactory, will be subject to approval, although such conditions may not have been arrived at by collective bargaining.

(7) In preparing basic codes, the following principles should be given consideration:

(*a*) Basic code provisions relating to maximum hours may involve appropriate consideration of the varying conditions and requirements of the several industries and the state of employment therein. An average work week should be designed so far as possible to provide for such a spread of employment as will provide work so far as practical for employees normally attached to the particular industry.

(*b*) Minimum wage scales should be sufficient to furnish

compensation for the hours of work as limited, sufficient *in fact* to provide a decent standard of living in the locality where the workers reside.

(*c*) Conditions of employment should contain necessary safeguards for the health and safety of the workers and for stabilization of their employment.

(*d*) The following principle emphasized in the President's statement should be recognized and adhered to:

I am fully aware that wage increases will eventually raise costs, but I ask that managements give first consideration to the improvement of operating figures by greatly increased sales to be expected from the rising purchasing power of the public. That is good economics and good business. The aim of this whole effort is to restore our rich domestic market by raising its vast consuming capacity. If we now inflate prices as fast and as far as we increase wages, the whole project will be set at naught. *We cannot hope for the full effect of this plan unless, in these first critical months, and, even at the expense of full initial profits, we defer price increases as long as possible.*

In the drafting of codes, attention is especially directed to this suggestion by the President that the Recovery Administration cannot be effective unless the consumer's buying power is protected. There will be full protection for the consumer. The codes should recognize the interest of the public in the matter of prices.

(8) At the hearings described in paragraph (2) every trade association or group proposing a code should be prepared to establish by evidence the requirements of section 3 (a), clause 1, of the Act which provides:

that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative to such trades or industries or subdivisions thereof.

and of section 3 (a), clause 2, of the act which provides:

that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title.

(9) It is the purpose of the act to encourage a voluntary submission of codes of fair competition and the procedure offered by these provisions for basic codes is intended to simplify and expedite this process. But in the event that codes of fair competition are not voluntarily submitted, attention is invited to other pertinent provisions of the act. It is provided in section 3 (d) of the act that the President upon his own motion or if complaint is made, may after public notice and hearing prescribe a code of fair competition for a trade or industry or subdivision thereof. Section 3 (d) reads as follows:

Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.

In this same connection, attention should be directed to the requirements of sections 7 (b) and (c), which read as follows:

The President shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry or subdivision thereof with respect to which the conditions referred to in clauses (1) and (2) of subsection (a) prevail, to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President under subsection (a) of section 3.

(c) Where no such mutual agreement has been approved by the President he may investigate the labor practices, policies, wages, hours of labor, and conditions of employ-

ment in such trade or industry or subdivision thereof; and upon the basis of such investigations, and after such hearings as the President finds advisable, he is authorized to prescribe a limited code of fair competition fixing such maximum hours of labor, minimum rates of pay, and other conditions of employment in the trade or industry or subdivision thereof investigated as he finds to be necessary to effectuate the policy of this title, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of section 3. The President may differentiate according to experience and skill of the employees affected and according to the locality of employment; but no attempt shall be made to introduce any classification according to the nature of the work involved which might tend to set a maximum as well as a minimum wage.

Under the foregoing provisions of the act if no code or agreement establishing standards as to maximum hours of labor, minimum rates of pay, and conditions of employment has been approved by the President, the President is authorized under the foregoing section 7 (c) to prescribe a limited code upon the basis of such investigations and after such hearings as he finds advisable.

HUGH S. JOHNSON,
Administrator.

Approved by:
NATIONAL INDUSTRIAL RECOVERY BOARD,
Hon. DANIEL C. ROPER, *Chairman.*
Hon. HOMER S. CUMMINGS,
Hon. HAROLD L. ICKES,
Hon. HENRY A. WALLACE,
Hon. FRANCES PERKINS,
Hon. CHARLES H. MARCH,
Hon. LEWIS W. DOUGLAS,
Hon. JOHN DICKINSON, *Executive Secretary.*

APPENDIX D

Legislative History of the National Recovery Act (H. R. 5755) With Excerpts From the Congressional Debates.

All references hereinafter given are to the pages of Volume 77 of the Congressional Record, 73rd Congress, First Session.

On May 17, 1933, the President sent a message to Congress, reading in part as follows, pages 3603, 3604:

"*To the Congress*:

Before the special session of the Congress adjourns, I recommend two further steps in our national campaign to put people to work.

I

My first request is that the Congress provide for the machinery necessary for a great cooperative movement throughout all industry in order to obtain wide reemployment, to shorten the working week, to pay a decent wage for the shorter week, and to prevent unfair competition and disastrous overproduction.

Employers cannot do this singly or even in organized groups, because such action increases costs and thus permits cut-throat underselling by selfish competitors unwilling to join in such a public-spirited endeavor.

One of the great restrictions upon such cooperative efforts up to this time has been our anti-trust laws. They were properly designed as the means to cure the great evils of monopolistic price fixing. They should certainly be retained as a permanent assurance that the old evils of unfair competition shall never return. But the public interest will be served if, with the authority and under the guidance of Government, private industries are permitted to make agreements and codes insuring fair competition. However, it is necessary, if we thus limit the operation of antitrust laws to their original purpose, to provide a rigorous licens-

ing power in order to meet rare cases of noncooperation and abuse. Such a safeguard is indispensable.

FRANKLIN D. ROOSEVELT."
THE WHITE HOUSE, MAY 17, 1933.

On the same date Mr. Doughton, Chairman of the Committee on Ways and Means of the House, introduced a Bill (H.R. 5664) "To Encourage National Industrial Recovery, to Foster Fair Competition, and to Provide for the Construction of Certain Useful Public Works, and for Other Purposes." This Bill was referred to the Committee on Ways and Means. On May 23, 1933, Mr. Doughton introduced a revised Bill (H.R. 5755) with the same title, which was referred to the Committee on Ways and Means and on the same day reported out by the Committee (Report No. 159) and referred to the Committee of the Whole House on the State of the Union.

On May 25, 1933, the bill was debated in the House. The first statement was made by Mr. Summers, of the Judiciary Committee, who explained that ordinarily the anti-trust features of the Bill would have to pass through his Committee but that they were waiving their rights in this particular instance. He stated, page 4201:

> "Title 1 of this bill proposes what amounts, in the view of the Committee on the Judiciary, to a suspension of the anti-trust law."

In presenting the bill to the House Mr. Doughton stated, page 4202:

> "Mr. Chairman, this bill now under consideration is one of the major pieces of legislation recommended by the Administration. In my opinion it is one of the most, if not the most important piece of legislation that will come before this Congress, or that has come before the Congress.
>
> "We have quite extended hearings on the bill. A number of witnesses, representing practically every

business, industry, and occupation in the entire country, appeared before our Committee. As near as I recall, not a single witness testified in opposition to this measure.

"This bill, as I understand, is favored or supported by industry, by agriculture, and by labor. Those three powerful organizations in this country are all behind this legislation.

* * * * * * * * * *

"This measure is an essential part of the plan looking toward economic and industrial rehabilitation and recovery. It is the keystone in the arch of that structure. It provides means for putting our unemployed to work for a living wage and under wholesome conditions and at the same time guarantees equal opportunity to those supplying the jobs, in that the Government will cooperate with industry in maintaining standards of competition in keeping with equity and justice. It charts a middle course between the ruinous or complete monopoly in vogue prior to the enactment of the Sherman Anti-trust Law and the error of unfair competition that now has a strangle hold upon business. It sets up flexible machinery which the President may use to prevent monopoly on the one hand and ruinous competition on the other. Flexible remedies are always necessary in emergencies, and no one will dispute that conditions are now critical and dangerous. In fact conditions are such that the very existence of government itself is threatened. The central feature of the bill is to maintain fair competition without granting monopoly and to provide fair standards of labor and working conditions. It seeks to apply the principle of the Golden Rule to business and industry and also to provide a stimulant that will promote courage, confidence and hope."

In the course of Mr. Doughton's speech, the following interruptions occurred, page 4206:

Mr. Cox. "Is the gentleman in a position to deny that this is a price fixing scheme? Under the provisions of the bill, cannot these industries that enter into these agreements fix the prices of their commodities?

Mr. Vinson of Kentucky. "As I read this bill under

the Code of Fair Competition, whether it be voluntary or involuntary, the agreements made among the labor industries or among the industrial concerns, deal with the maximum hours of labor, the minimum pay and the working conditions. These factors enter into the completed cost of the article, but, so far as the bill being a price fixing bill, I do not regard it as such.

Mr. Cooper of Tennessee. "It has all to be approved by the President of the United States.

Mr. Celler. "Personally, I believe that the dissatisfaction the anti-trust decisions of the Supreme Court has always been to the effect that there was inability to arrange something akin to price fixing, and unless you have some price fixing, you will have the same objection to this bill that the manufacturers throughout the country are leveling against the interpretation by the Supreme Court of the Sherman Act. You must have price fixing, otherwise you destroy the purpose of the bill.

Mr. Shallenberger. "In reply to the question of the gentleman from New York (Mr. Celler) I recall in the hearings that we had Mr. Harriman, the President of the United States Chamber of Commerce, before us, and I brought up that particular question. It was stated by him and agreed to, I think, and understood by the Committee that whatever price fixing or rules or regulations are brought into this matter are entirely under the direct control of the President of the United States, and we give him authority through this Arministrator to regulate this matter so that it will not affect adversely the interest of the people but will also help industry.

Mr. Cox. "Is not that price fixed temporarily?

Mr. Shallenberger. "To whatever extent it is granted.

* * * * * * * * * *

Mr. Celler. "I hope the members of the Committee will be candid about this matter. I think they ought to admit that there is a possibility and a probability that these agreements might fix prices, but they must be approved at first hand by the President of the United States. That is the way I read this bill. There is nothing short of that.

Mr. Vinson of Kentucky. "You may have an increase in the commodity price that a fair price for the product might be secured. If you are going to increase labor costs on a fair competitive basis, you may have some increase in the price in a given product. It may eliminate cut-throat competition. You may be able to put men back to work who cannot work now because of cut-throat competition, but I maintain there is nothing in this bill to say that it is a price fixing bill as such.

Mr. Celler. "If we can cut out the cut-throat competition by fixing the price, let us do it. I am heartily in favor of it."

Mr. Kelly of Pennsylvania, speaking in defense of the bill, stated, pages 4218, 4219, 4220:

"Mr. Chairman, for ten years or more almost every trade and industry has been trying to establish codes of ethics and fair practices which help build business on a better basis. They have met in convention and have earnestly sought to meet the problem of destructive competition in a fair and lawful manner.

"I have been present when some were adopted. I have read more than fifty codes adopted by various trade associations. They are all practically the same and they are all equally impotent. They do not have and they cannot be given, without proper supervision, a weapon powerful enough to do the work required.

"I hold in my hand the code adopted by the fabricators of Ornamental Iron, Bronze, and Wire, approved by the Federal Trade Commission. It provides against the substitution of inferior materials, selling goods below cost with the intent of injuring a competitor, secret rebates, breach of contract with competitors, shipping goods which do not conform to samples, bribing buyers or employees of competitors, discrimination in price between purchasers to create monopoly, obtaining information surreptitiously as to competitors bids, and so forth.

"All these declarations against unfair practices are but a pious waste as far as results are concerned. Cut-

throat competition rages through trades and industries which have adopted these rules.

"What we must have is a real definition of fair competition and an effective plan for securing it in trade and industry.

"This industrial recovery act sets up a new meaning for the term 'Fair Competiton'. These codes must deal with the fundamental elements of competition under the modern industrial system if they are to carry out the purpose of this Act. The four essentials in any code of fair competition are price, production, wages, and hours.

"There must be agreement as to minimum price. Omit that and the door is open to all the cut-throat competition which has almost destroyed industry. The price must be fair in that it includes a just return to the producer. Establishment of a maximum price will not serve since it would permit destructive competition from that level down to zero. Under it practically all todays evils would flourish.

"The code must contain agreement as to production. We are undertaking to establish a balance between production and consumption. If there is unrestrained production of goods without regard to their consumption, surplus supplies will pile up, with resultant unemployment and chaos. Each industry can work out its apportionment of production to the various units. Without doubt the past performance of each unit will be the yardstick for determining its quota of the production needed to meet the demand. As consumption increases, the production will rise in proportion.

"The code must contain agreements as to wages and hours. These are mandatory under the law and will be vital to the maintenance of fair competition.

"If this measure is enacted, there will be established a new and better definition of fair competition. It will include all the trade practices which have been worked out in the past. It will also include within its scope fair prices, fair production, fair wages and fair hours. If that kind of competition can be secured and safe-guarded, the economic problem is solved."

• • • • • • • • • •

"Mr. Chairman, the entire purpose of these provisions is to secure constructive and fair competition and to outlaw unrestrained, destructive and anti-social competition. It is quite true that it is a departure from the philosophy embodied in the anti-trust laws as interpreted for forty years. But 'new conditions teach new duties; time makes ancient good uncouth.' We are in a new age which the men of 1890 could not possibly have foreseen.

"Today the requirement that business shall be war is suicidal. We have drifted on the old pathway while everything changed and the pathway slipped into a swamp. Instead of dealing with business through the Department of Justice this measure permits governmental cooperation through an agency which will help business serve its real purpose of satisfying human needs under fair conditions."

* * * * * * * * *

"Mr. Chairman, this measure provides that for the life of the act and for sixty days thereafter any code agreement or license issued under it shall be exempt from the provisions of the anti-trust laws of the United States.

"This provision must be understood in connection with the previous requirement that no code shall be designed to promote monopolies or to eliminate or oppress small enterprises or discriminate against them.

"The anti-trust laws have had two entirely separated effects. The first is the vitally important one of prohibiting monopoly and all coercive or oppressive tactics toward competitors, which tend to destroy competition and create monopoly.

"This part of the anti-trust laws remains in full force and effect. The operation of this law will be in full accord with it. In fact, it will add to the strength of the laws against monopoly. It was cut-throat competition on the part of the great corporations which lead to the passage of the Sherman Act. The debates in Congress show that it was the complaints of the smaller business men against destruction through unfair practices and destructive competition that lead to the enactment of the law.

"However, the law has been held to prohibit agreements of beneficial kind between independent competitors. It has banned cooperation even when united action has been in the public interest.

"The result has been compulsory competition of the kind which leads to the ruin of the smaller enterprise. The only remedy for excessive production is controlled production. But limitation of production cannot be accomplished by one concern any more than limitation of armament can be accomplished by one nation. There must be agreement and cooperation."

. . . . . .

"This bill cuts a clear pathway through the undergrowth of forty years of legislation and judicial interpretation. It accepts the fact that competitors are practically on the same level of costs in this advanced era of manufacture, and that there is no middle ground between destructive industrial war on one hand and industrial peace through mutual agreements under the supervision of the Government.

"These agreements, properly supervised, cannot lead to oppressive prices. Industry knows that the lowest prices consistent with a fair return induce greater consumption, and greater consumption in turn makes lower costs possible. We have also learned during the last four years that unless the industry and its payroll are preserved there is injury done the entire public.

"Mr. Chairman, the real purpose of the anti-trust laws was to protect the public from unregulated monopoly power. Great consolidations of capital threatened the public welfare. Yet in our own times have come stupendous mergers which are seeking and securing the power which the law sought to guard against. This bill will remove the incentive to merger and consolidation. It will give the little independent enterprise its fair place in the industry and protect it against oppressive methods.

"'Under this plan of partnership controlled by industry and government, there will be preserved every wholesome pohibition of the anti-trust laws against monopoly and oppression. At the same time it will permit agreement for the restraint of the unfair competition which is the sure road to monopoly.

> "As to the attitude of the United States Supreme Court on this problem of planned and controlled industry, it is necessary to look only at the Appalachian Coals decision. That will show how far the Supreme Court will go in any effort to help bring law and order into disorganized industry."

Mr. Samuel B. Hill of Washington, speaking in defense of the bill, said, page 4223:

> "It has been objected that this legislation suspends the operation of the anti-trust law. The prime purpose of the anti-trust law is to preserve fair competition in trade and industry and to preserve that fair competition against oganized monopolies.
>
> "I say to you that the purpose of Title 1 of this bill, which suspends for a certain time the anti-trust law, promotes the spirit of the anti-trust law itself because we propose here to add to or supplement existing law designed to preserve conditions of fair competition. The anti-trust law does not take into consideration unfair competition resulting from the exploitation of labor. It has developed that that is the greatest factor in unfair competition that confronts industry today."

and on page 4224:

> "The anti-trust law is not set aside as to monopolies. It is suspended for the purpose of enabling trade associations and industries to enter into trade agreements under the supervision of the Administrator for the protection of labor against starvation wages and for the protection of legitimate industry against sweat shop competition."

Mr. Cox of Georgia, speaking in opposition to the bill stated, page 4327:

> "In this bill Congress delegates powers which it does not possess—the power to regulate and control the internal affairs of the States, the power to control all industries from the point of production to that of distribution, the power to regulate hours of

labor and to fix wages. My colleagues, it is the most gigantic price fixing scheme ever proposed in the history of any free government.

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"The testimony of the witnesses representing industry appearing before the Committee very frankly confessed that they wanted this bill because it would authorize competitors to come together and form price fixing agreements now prohibited by the anti-trust laws."

Mr. Celler, of New York, speaking in favor of the bill, page 4338, compared the powers granted under Title 1 to those granted to the War Industries Board in 1918, which President Wilson established by a letter addressed to Bernard M. Baruch under date of March 4, 1918, quoting the letter.

SENATE DEBATES

Senator Wagner in opening the discussion in favor of the bill stated, page 5153:

"Title 1 of the present bill is intended to return to the objectives of the anti-trust laws. The first step taken by the bill is to make competition constructive rather than ruinous and to permit cooperation whenever a wise policy so dictates. The bill permits any trade or industrial group to draw up a voluntary code of fair competition, and to submit it to the President for approval. Such a code may contain the standards of fair competition, the practices which should be banned as unfair and the methods which, in the judgment of the group, are most likely to revive industry and increase employment. These methods may include exchange of information, cooperative marketing, standardization, simplification, and a wide variety of other features.

"When such a voluntary code is approved by the President it becomes binding upon the entire trade or industry and any action complying with it is exempted from the provisions of the anti-trust laws. But

before the President accepts any code it must be proved that the code will not tend to promote monopoly, and that the group which proposes it is truly representative of the trade or industry and imposes no inequitable restrictions upon membership. Nor will any code be approved which discriminates against small enterprises.

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"This bill gives general recognition to economic realities which the Court (Supreme Court) operating even under the anti-trust laws, has been constrained to admit in specific instances (Appalachian Coals case). When viewed in this light it is clear that the bill is not a measure designed to curtail production or to lessen the volume of trade. It is a measure to expand trade in commerce by removing the barriers which have caused factories to close and men to walk the streets in idleness."

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Page 5156:

"I do not mean to imply that the pending legislation contemplates price fixing. I refer to these cases (Rent cases and Minimum Wage Laws) simply because price fixing is the most far reaching form of economic regulation; and if the Court will sustain price fixing when the economic situation warrants, there is no reason to believe that the Court will find anything unconsitiutional in this bill."

At page 5162:

Senator Reed. "Under an early section of the bill in Title 1 it is evident that price fixing is intended by agreement among the producers of commodities, and it is made a crime to undersell that fixed price. Does the Senator think it will be possible at the expiration of two years to revert to a system whereby it is a crime to adhere to that fixed or pooled price?

Senator Borah: "I do not think it is possible."

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At pages 5162, 5163:

Senator Borah. "It is perfectly evident, then, that the provisions of the code are going to be combinations or contracts in restraint of trade, or it would not be necessary to suspend the anti-trust laws. They could not possibly be in conflict with the code unless the code runs contrary to this provision which says a contract or combination in restraint of trade is illegal. What is the necessity of suspending this law which condemns trusts unless your new code is to be a trust? What is the necessity of suspending a law which denounces combines in restraint of trade unless your new codes may become a combine in restraint of trade? What is the necessity of suspending a law unless you are preparing to violate it?

Senator Wagner. "May I say to the Senator that while the objective of the anti-trust laws, the perpetuation of genuine competition, was worthy, the law failed to reach that objective and at the same time sanctioned the largest combination of business that we have ever had in the history of the country. Yet the same law prevented smaller business men from cooperating in order to put competition upon a basis of efficiency, and has resulted instead in a destructive, cutthroat competition. We frankly propose to suspend the evil features of the anti-trust laws without diminishing their capacity to serve a useful end."

At page 5237:

Senator Reed. "To come back to the argument, a moment's reflection on the power attempted to be given to the President here, must shock any reflective person. Remember, please, that under a lot of beautiful phrases are couched the most tremendous powers. We speak of codes of fair competition. It is only by indirection, and by admission of the sponsors of the bill, that we realize that that means not merely planting roses around the factory so that the conditions of employment will be pleasant, but it means fixing prices, it means apportioning output, it means creating by the sanction of law, the same kinds of pools and price fixing conspiracies, within an indus-

try that we have been fighting for so long, for so many decades."

In answer to some of the objections of Senator Reed, Senator Wagner stated, page 5238:

"A suggestion was made that the price at which a particular commodity may be sold in the market would be fixed. The Senator was present during our discussion in the Committee. No such thing is contemplated as the fixation of prices. All that will be provided is that there shall not be any sale at a price below the cost of production, and that may differ in different industries in different sections of the country.

"That, everyone admits, is an unhealthy situation, where industries are permitted to indulge in rebates, discriminations, and selling below cost of production in order to destroy some little business man in the community and, when he is wiped out, to restore the old price. It is that type of practice we are seeking to eliminate."

At page 5238:

Senator Black. "Mr. President, I am very much interested in the Senator's statement, that, in his judgment, this bill provides for price fixing."

Senator Reed. "Clearly it does."

At page 5243:

Senator Clark. "As a matter of fact, the effect of Section 5 of this bill is to reverse of what has been the policy of the United States for almost fifty years. Since the passage of the Sherman Anti-Trust Act it has been a crime in this country to indulge in price fixing. Under the terms of this bill it becomes a crime not to indulge in price fixing, punishable by penalties set out in the bill."

Senator Long. "Exactly."

Senator Borah. "Mr. President, you cannot fix the price of labor unless you fix the price of the commodity which you are selling. That is a certainty;

and what is being done here is to make it a crime for anyone not to join in the combine for the purpose of fixing prices."

At page 5244:

Senator Wagner. "Mr. President, how can we provide against monopoly in any other way except as we have provided here? We say that the President must find that the code is not designed to promote monopolies. We may put it that the code shall provide against the creation of a monopoly. That is the same thing.

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"I dislike to interrupt the Senator, but there are some things I want to clear up.

"I have reiterated on the floor two or three times, and it was stated any number of times in the Committee that it is not contemplated that prices shall be fixed, because the fixation of prices is not in conformity with the preservation of fair competition. I made that as clear as I could and still there is constant reiteration. I do not think we ought to set up a straw man here and then knock him down.

Senator Borah. "I think the reiteration arises out of the fact that it is difficult for some of us to see how we are to control the question of wages without controlling the question of prices.

Senator Wagner. "We can provide that the sales shall not be at prices below the cost of production, but as to what that cost of production is depends on the efficiency of each particular plant and we cannot have one fixed price.

Senator Hastings. "Mr. President, I want to ask the Senator from New York a question.

"I want to find out whether there is anything in the bill which would prevent the fixing of prices.

Senator Wagner. "Yes; because we are providing a code of fair competition and providing for practices of fair competition and against practices which bring about unfair competition. That is also well known in the law. The Senator from Idaho yesterday was anxious to have that specifically defined. We do

not define it in the anti-trust laws. We do not define it in the Federal Trade Commission Act. We simply use the words 'unfair competition.' We do not define it in the Tariff Commission Act.

At page 5246:

Senator Borah. "Returning to the matter which we were discussing a few minutes ago, in which I am vitally interested, I asked the Senator from New York if he would be willing to insert after the word 'title' and the colon, on page 4, line 15, the following:

'Provided, that such code or codes shall not permit combinations in restrain of trade, price fixing, or other monopolistic practices.'"

Senator Wagner. "Mr. President, the Senator from Idaho by that proposal does not mean that a code could not provide in general terms for uniform price or provide that there should not be any cut-throat competition and selling below the cost of production? That of course he does not intend to interfere with?"

Senator Borah. "No; I do not.

The amendment above suggested by Senator Borah was adopted by the Senate on page 5247. When the bill was passed by the Senate and went to conference, the conferees changed the form of this amendment to Section 3(a) of the act to read as follows:

"Provided that such code or codes shall not permit monopolies or monopolistic practices" (Conference Report, House Report No. 243, 73rd Congress, 1st Session, page 2).

thus eliminating all reference to price fixing and combinations in restrain of trade.

Proceedings in the Senate After the Submission of the Conference Report.

At page 5766:

Senator Long. * * * "The conferees have eliminated that part of the Borah amendment which would prevent price fixing."

Senator Wagner. "Mr. President, I do not think that is quite accurate. We sought to prohibit price fixing when it would result in monopolies or monopolistic practices, which is the only kind of price fixing to which any objection has been raised on this floor. The words are very plain.

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"The amendment is that no code shall permit monopoly or monopolistic practices, so that if price fixing results in a monopoly or monopolistic practice it is prohibited by the provisions of the measure.

At pages 5834, 5835:

Senator Borah. "The effect of that provision (exemption from the anti-trust laws) is to eliminate all restraint which the anti-trust laws would otherwise impose on the making of the codes which are provided for in previous sections of the bill. In other words, if those who are making the codes see fit to provide anything that heretofore would have come in conflict with the anti-trust laws, that inhibition is now removed, because any provision which may be incorporated in such codes may not come in conflict with the anti-trust laws in view of the fact that the anti-trust laws are suspended as to any provision of the codes.

"Mr. President, on page 4 as the bill passed the Senate there was placed in it this amendment offered by myself and accepted by those in charge of the bill: 'Provided, that such code or codes shall not permit combinations in restraint of trade, price fixing, or other monopolistic practices.'

"That amendment was changed in conference to read as follows: 'That such code or codes shall not permit monopolies or monopolistic practices'."

"It is difficult for me to understand what was in the minds of the conferees. It must be that the conferees and those sponsoring the bill are of the opinion that price fixing is not a monopolistic practice; it must be their view that combinations in restraint of trade are not monopolistic practices. I can perceive no clarity in the amendment as the conferees have changed it and as it is now found in the bill, except upon the theory that those sponsoring the measure are of opinion that neither price fixing nor combinations in restraint of trade are monopolistic practices. In other words, it is the view, I take it, of those in charge of the bill that under the bill there may be formulated programs of price fixing and that there may be combinations in restraint of trade; and, as I take it, according to the bill as now drafted and construed by those who are its sponsors, any code framed by associations under this bill which may provide for a combination in restraint of trade would not be considered to infringe the rule against monopolistic practices—or any combination which would have the effect of fixing prices would not be a monopolistic practice. I can work out no other construction of the amendment as provided by the conferees.

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"It is thoroughly understood by the business men generally that this is the effect of the amendment.

Senator Wagner in answer to this and other statements of Senator Borah said, at page 5836:

"In order that we may not have any misunderstanding about the bill, let me say this, and I only reiterate it because of the constant misstatement as to what the bill does: The bill makes a declaration of law, not merely a provision of the proposed codes, that there cannot be any monopoly or monopolistic practice. That is as clear and definite as any declaration of policy can be made. Any one can go into Court if the code violates any particular provision of the law and restrain its enforcement on the ground that it is monopolistic.

Senator Borah. "But the Senator has declared in the conference report that combinations in restraint of trade are not monopolistic practices.

Senator Wagner. "Because the Senator knows that there is as much difference, as the Courts have construed the word 'combinations in restraint of trade and monopolies' as there is between night and day. 'Restraint of trade' really means restraint of competition. One of the things we want to deal with being the subject of competition but we are making an assurance against monopolistic practices greater than has ever been contained in any law heretofore enacted.

. . . . . .

Senator Borah. "The Senator does not answer my question. What does the Senator think if we have a code which permits combinations in restraint of trade and puts individuals out of business by restraining trade? Is not that a monopolistic practice?

. . . . . .

Senator Wagner. "That all depends. We may provide for some competitive method which, under the decisions of the Courts today, may be regarded as in restraint of trade, which would eliminate cut-throat, sweat shop competition, the thing we are after. Under the provision the Senator proposed we could not eliminate or destroy cut-throat competition.

Senator Borah. "The amendment to which the Senator from New York refers provided that these codes should not permit combinations in restraint of trade. That is all.

Senator Clark. "And price fixing."

Senator Wagner. "The term 'price fixing' is used rather carelessly here too. It has been held that when we fix the wages of an individual we are fixing the price of that particular commodity, namely labor. Under the proposal the Senator from Idaho offered we could not, under the terms of the bill, fix a minimum wage scale.

Senator Borah. "Oh, no. The Senator now provides that we may not only fix a minimum scale but we may fix prices, and, as these telegrams say, unless business people are permitted to fix price levels they cannot protect themselves against the wage increases. That

is reasonable. That is perfectly sound. If we fix wage levels, we will fix price levels at the same time."

Senator Wagner in defense of the conference report said, pages 5837, 5838:

"If this legislation passes, it will be the first time that small business will have a voice in the government of industry. It has none today. Under the law as it exists, with the cut-throat competition, the under-selling, and the other vicious practices which are permitted, large business concerns have been able to destroy small business concerns, compelling them either to sell out to the large industry or to join in a merger. This has been the way the anti-trust laws have worked and this is the thing we want to prevent in the future. In formulating the code of fair competition within each industry we want to give an equal voice to the small business men and the large business men. With this in view we provide that no trade or industrial association which proposes a code shall impose any inequitable restrictions upon membership.

"I am in fundamental sympathy with the objections of the Senator from Idaho. I agree with him that what we must provide against above all else are monopolies and monopolistic practices. But I say to the Senator that we have taken every precaution in this legislation. We not only provide that the President, in passing upon a code, must find that the code neither tends to promote monopoly nor discriminates against small business men. In addition we have accepted the proposal of the Senator from Idaho and gone beyond reliance upon a finding by the President. We have incorporated a definite declaration of law to the effect that the codes shall not permit a monopoly or monopolistic practices. The sort of price fixing which the Senator fears, price fixing which is part and parcel of monopolistic practices, is outlawed by the same language which outlaws such practices.

"But we must not accept the Senator from Idaho's prohibition of all restraints of trade. The words 'in restraint of trade' through Court interpretations, have come to embrace a much wider field of action than the word 'monopoly'. To ban everything which the

Courts have called 'restraint of trade' would defeat the very purposes of this act. It would prevent attempts to limit competition to levels of efficiency and fairness. It would prostrate concerted efforts to abolish sub-standard wages, excessively long hours, and the other harmful practices that have dragged business down to where it is today.

"The trouble is that the Courts have interpreted 'restraint of trade' to mean 'restraint of competition'. Thus if we tried to restrain some of the vicious types of competition against which this act is directed, we would be hampered by the Courts conceptions of 'restraint of trade'. We might even find it difficult to establish minimum wage laws by agreement, for such agreements do restrain certain kinds of competition.

"Let us examine how the law provides against monopolies. In the first place, the declaration of policy states a purpose 'to promote the fullest possible utilization of the present productive capacity of industries in order to avoid undue restriction of production'. Monopoly, on the other hand, let me point out, seeks to curtail or to withhold supply and is inconsistent with this declaration.

"Section 3 (a) (2) provides, as I have said before, that no code which is designed to promote monopolies can be approved.

"Section 3 (a) (6) provides—and here is another important safeguard—that every code shall be subject to conditions necessary to protect consumers, competitors, employees and others. If we couple this proviso with the declaration against monopoly in Section 3 (a) (2), we get full assurance that the fears of the Senator from Idaho are unwarranted.

The same provisions which prohibit monopoly prevent monopolistic price fixing. The declaration of policy declares in favor of increasing the consumption of industrial and agricultural products by increasing purchasing power. This is inconsistent with monopolistic price fixing, which decreases consumption by raising prices and thus reducing actual purchasing power. But we do not want to prevent every possible thing which might be called price fixing, even when no question of monopoly is involved. We all

agree as to the salutary effects of prohibiting sales below cost of production. Yet such a prohibition is certainly price fixing."

And again at page 5840 Senator Wagner said:

"Mr. President, I want to point out the probable results of putting into this Act a prohibition of 'price fixing'. The term 'price fixing', according to court decisions, has very wide connotations. It includes much more than monopolistic price fixing. It includes any concerted efforts to deal with the price problem in any way, to bring price stabilization, or even to engage in such other sorts of industrial cooperation as might tend to prevent harmful price fluctuations.

"For these reasons, a prohibition of 'restraint of trade and price fixing' as these phrases have been interpreted by the Courts, would stand in the way of the most salutary effects which this bill is designed to accomplish.

"For instance, exchange of information, which serves to make competition rational instead of blind and destructive and which thus expands trade in commerce would be prohibited. It was declared an illegal restraint of trade in *United States* vs. *American Linseed Oil* (1923), (262 U. S. 371).

"Price stability, as distinguished from monopolistic price fixing, is a universally recognized necessity in order to achieve economic welfare, and yet it would be made practically impossible by the Borah amendment. This amendment would prevent even the publication by businesses of their own price schedules and their adherence to these schedules even for a short period of time. Such a practice was declared an illegal restraint of trade in the Linseed case. Yet such practices might be necessary to prevent unfair price cutting and other destructive price manipulations.

"The amendment would prevent treatment of the problem of price cutters who sell below cost."

Senator Black, page 5843, stated:

"The Sherman Anti-Trust law is inconsistent with the present measure. It is plain to anyone who is

familiar with the bill and familiar with the Sherman Anti-Trust Law that both of them cannot be in effect at the same time as the law. They are thoroughly inconsistent. The Sherman Anti-Trust Law is a law to prevent combinations in restraint of trade. This bill, it is admitted, if it is to be effective—and I do not say that with any argument against the idea at this time—will create combinations in restraint of production. That is one of the objects—to destroy what is called 'cut-throat competition.' So the bill plainly will permit combinations in restraint of production.

"The bill also will permit combinations in restraint of low price. No one can deny that. If it gives the power and authority to combine for the purpose of preventing the sale of goods below the cost of production, it necessarily means a combination for the purpose of preventing the sale of goods at low prices."

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Senator Wagner. "While the prevention of cut-throat competition and the exploitation of labor—which is practically the same thing—in a particular industry may reduce or, indeed, perhaps altogether prevent production, industry as a whole will benefit by its prevention and therefore ultimately production will be increased."

Senator Black followed this with a long speech, the gist of which is that by eliminating the safeguards of the anti-trust acts, prices and profits would very materially increase, to the great detriment of the people as a whole.

APPENDIX "E"

Extracts from Hearings Before the Committee on Ways and Means, House of Representatives, Indicating the Competitive Abuses Sought to be Remedied by the National Industrial Recovery Act.

STATEMENT OF HON. LEWIS W. DOUGLAS, THE DIRECTOR OF THE BUDGET:

"I am quite sure that this committee is aware of the fact that in certain industries there is what is known as 'cutthroat competition, cutthroat selling.' I am certain the members of the committee are aware of the fact that in certain industries where there are a few employers and manufacturers not imbued with public spirit, wages have been cut to a sweatshop level.

For the purpose of rectifying those conditions, both through the action of industry and of the Government, this bill, H. R. 5664, was introduced. It is divided into three titles." (page 9)

STATEMENT OF DONALD R. RICHBERG, OF CHICAGO, ILL.:

"Now, the result of that upon the managers of industry has been equally or more distressing, because those who desired to maintain fair conditions of wages and working conditions found themselves absolutely unable to compete with business enterprises that constantly cut wages and operated under very unfair and unhappy working conditions. So again, there is no doubt a common purpose and desire among both the managers in industry and the workers in industry to try to establish, in some way, decent standards of wages and working conditions, and I believe it has come to be realized by both groups in the period of this depression that the most unfair competition that existed in industry was the competition through depressed and disorganized and deflated labor.

In other words, the manufacturer who desired to put out a decent product at a decent price, and at the same time pay decent wages, found that he was simply up against a competition that he could not meet, and, willy nilly, he had to

cut wages and he had to work long hours, and he simply had to oppress his employees, although he might have desired to do the square thing and the right thing. (p. 67)

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"That throughout industry there has been complete uncertainty as to what could be legitimately done by a trade association, and there has been very great certainty that some of the things that the *organizations particularly wanted to do, in the line of price stabilization at least, were illegal.*

Therefore, facing this present condition, where the competition which normally existed, perhaps through unfair trade practices, has been intensified by a competition for cheap labor, a competition in long hours, a competition destructive of the physical welfare and well being and the prosperity of the country—in that situation these trade associations perhaps have enlarged their vision, enlarged their desire to get together in agreements, and it has been perfectly apparent that no adequate agreements could be obtained which would not conflict with the antitrust laws. (p. 68)

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"Now, the detail of the bill is merely an effort to write those principles into law; and, of course, I have felt, as I said, that the primary unfair competition from which we were suffering here was the unfair competition in the use of labor. I have been peculiarly interested in those clauses of the bill designed to protect labor, to insure the setting of fair standards of work; and I think you can readily see that there is no honest reason for complaint when an industry is given the opportunity to come under standards which are fixed throughout the industry, and therefore does not face the unfair competition of groups that can break down those standards. In other words, there is every encouragement for an industry to do the right thing under those circumstances. (p. 70)

"Mr. Knutson. In a general way, it encourages manufacturers to do the same thing that the cartels are doing in Europe?

Mr. Richberg. I think, in a general way, that may be true; yes.

Mr. Knutson. And they could not be prosecuted for getting together and fixing prices?

Mr. Richberg. Assuming that the prices themselves bore a reasonable relationship to the costs, and so forth; yes.

Mr. Knutson. Of course, they would be subject to regulations by the Government; but it would not be necessary, would it, for the steel industry, under this legislation, to get specific permission from the Government to fix prices of steel products, and to limit production?

Mr. Richberg. I would say that depended entirely upon the regulations that were enforced by the administration, which would be suited to the needs of a particular industry. For example, there might be in a certan industry, obviously, such an intensive competition that there would be really no reason for putting any particular limitations on the code of that industry along that line; but you might have an industry—and I am not particularly pointing my finger at the steel industry—you might have an industry with such conditions already existing, or that could be developed, that the Government would not want to give them a free hand in fixing prices and limiting output. It seems to me that the virtue of the bill is its flexibility, and also its responsibility; because it goes back to the President and the agencies that he has created, and the responsibility cannot be lost in some board that may or may not have the interests of the community at heart. (p. 72)

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"Mr. Richberg. That is quite correct.

Mr. Hill. Unfair competition, in other words, has grown up, as you have stated, through, you might say, the exploitation of labor or through the manipulation of wages and hours of labor.

Is your conception of this legislation that it proposes to effectuate the primary objective of the antitrust law through the elimination of that kind of unfair competition, and that it is supplementing the antitrust laws in its object to eliminate unfair competition by bringing about an improvement in the conditions of labor, the conditions of which have been one of the factors in unfair competition.

Mr. Richberg. I think that is a very good statement of it, and I am very glad it has been brought out. I think I should have emphasized the fact that you have just

brought out, that one of the primary purposes of the anti-monopoly law or the antitrust laws was to prevent the unfair competitive practices that had grown up, where control of the market would permit a large enterprise to go in and undersell a small enterprise temporarily and destroy that business, and then put their price back again. That is typical of the unfair practices that arose through the development of the monopoly era.

Of course, it can be said, that while, on the surface, and by the letter of the language relieving industries of the antitrust acts, this act, properly administered should really effectuate the purposes of the antitrust act in dissolving unfair competition.

Mr. Hill. At the same time prevent, or at least not encouraging organized monopolies.

Mr. Richberg. Yes.

Mr. Hill. In other words, this legislation simply carries out, if it operates as it is anticipated by its sponsors, to effectuate the very purpose which was in the minds of the legislators at the time they enacted the antitrust law, namely, the prevention of unfair competition.

Mr. Richberg. I believe so. May I add, that I appeared first before a committee of Congress on the subject of antitrust legislation in 1907, and at that hearing I was peculiarly impressed with the testimony of many independent small business operators to the effect that they were not afraid of big business; they were not afraid of huge enterprises, so long as fair competitive conditions could be maintained, because they claimed there was an efficiency in a small enterprise that was lost in a big enterprise, and if they would be set free from unfair competitive practices they could maintain themselves; they were not afraid of mere size.

I believe that is still, to a large extent, true. I think there is an enormous waste and lost motion in huge enterprises which permits a small enterprise, under conditions of fair competition, to maintain itself.

Mr. Hill. This legislation, from your viewpoint, is not breaking down the primary object of the antitrust law?

Mr. Richberg. I would say not.

Mr. Hill. It is rather to supplement, to control, and to effectuate the primary object of the antitrust law?

Mr. Richberg. Yes. And in that connection let me say this. There have grown up, under the antitrust laws, a body of, let us say, judge-made law, which has left a great state of uncertainty throughout industry, and great difficulty of combining for benevolent purposes, because of the restrictions upon malevolent purposes, and this endeavors to make a distinction not between a good and a bad trust but a distinction between good business and bad business. (pp. 78 and 79.)

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It is necessary to restore credit to industry and make it possible to expand industrial enterprises, whereas when they are down at the very bottom, of course, their credit is also at the bottom.

Mr. Ragon. Do you think industry, if given this legislation, would be given an impetus to move forward that would be helpful to the rehabilitation of the country?

Mr. Richberg. Undoubtedly, because the mere fact of increasing your purchasing power, while at the same time being able to exercise control of cutthroat competition, in itself, would stimulate aggressive men to move forward in industrial enterprises, to take a chance. (p. 85.)

STATEMENT OF HON. ROBERT F. WAGNER, A UNITED STATES SENATOR FROM THE STATE OF NEW YORK:

Senator Wagner. "Mr. Chairman and gentlemen, this bill is essentially an employment measure. Its object is to bring about an increase of employment at a level of wages which will afford a standard of living in decency and comfort. (p. 91)

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I believe, too, that in addition it is going to improve and strengthen the ethics within industry itself by doing away with the sweatshop, the kind of competition which has been tearing down industry and where in self-defense frequently they have been required to reduce wages below a standard of decency.

In that way it is going to have not only a great economic effect by increasing purchasing power, but also a great social effect in giving the worker a wage which will permit

him to live in decency, something that he feels and I feel he is entitled to under our economic system.

The first title of the bill is devoted to the stimulation of employment through private cooperative effort. The declaration of policy sets forth the existing national emergency which has produced widespread unemployment and disorganization of industry and is undermining the standards of living of the American people. It also establishes the constitutional bases upon which title I of the bill is erected. Constitutionally, title I is founded upon the interstate commerce clause and the general welfare clause of the Constitution. The declaration of emergency bears upon both of these constitutional grounds. Obviously, the conditions produced by the emergency affect the general welfare. It is equally plain that by reason of the emergency many commercial and industrial practices—and I think this is important, gentlemen—by reason of the emergency, many commercial and industrial practices become a burden upon interstate commerce which in normal times would perhaps not be so regarded." (p. 92)

"The purpose of the present bill is not to abolish competition but to lift its standards and to raise its plane so as to eliminate destructive practices, unfair practices, competition in the reduction of wages, and the lengthening of hours. In other words, efficiency, rather than the ability to sweat labor and undermine living standards, will be the determining factor in business success.

Through the cooperative action made possible and lawful under this bill industry may for the first time effectively do many of the following things: I am not going to read them all, Mr. Chairman and gentlemen, but industry, as you know, has attempted to provide for market research and analysis; cooperative marketing and sales promotion; product research; development of sound intra-industrial relations; budgeting; simplification and standardization.

But, of course, with the law as it is today they have been discouraged in that sort of activity. And for another reason, that they could reach no definite conclusion or agree upon no particular conclusion as to production and hours of labor, without violation of the anti-trust laws. Now they can do these things effectively under the provisions of this bill so as to make a real contribution, in my opinion, to progress.

In addition, they may engage in numerous other cooperative devices, subject to the approval and supervision of the President.

At the present time it is frequently the person with the lowest industrial standards who determines the standard for the entire industry. The purpose of this measure is to make the best judgment and the highest ideals of the industry govern its competitive activities. That is very important and we must accept it as true. It largely accounts, in my opinion—and I am sure that the members of the committee are cognizant of it—for the tremendous support which is being mobilized throughout the country for this legislation. They see in it at least a hope *that this cutthroat competition* which has been dragging us down, reducing our standards of living may be for all time eliminated, and we may go along on a higher standard of living. That will be a great contribution toward the happiness of the American people.

As I have said, the purpose of this measure is to make the best judgment and the highest ideals in the industry govern its competitive activities, replacing the now low standard of sweatshop, cutthroat competition. (p. 96)

STATEMENT OF WILLIAM GREEN, PRESIDENT AMERICAN FEDERATION OF LABOR:

In operation, industry will be permitted to function in a cooperative way, freed from the effects of evil practices destructive of both industrial ownership and labor, and labor will be accorded enlarged and increasing opportunities for employment along with the exercise of a constantly increasing purchasing power. p. 118)

* * * * * * * *

The right to organize into bona fide labor organizations, to bargain collectively, to be represented by representatives of their own choosing, is as essential to the well-being of labor as the exercise of the right of capitalists to form corporations and to engage in organized industrial activities is to capital. A summation of the outstanding provisions of the bill clearly shows that industry may organize and through such organization develop cooperation, eliminate unfair competitive practices, prepare a code of fair competition which sets forth standards covering particular

trades and competitive practices within industry. The antitrust laws applicable to industry are suspended so that industry may unite and cooperate for the achievement of the purposes set forth in the act. (p. 119)

STATEMENT OF HENRY I. HARRIMAN, PRESIDENT, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA:

"Now, whatever the exact figures may be, it is perfectly evident that we cannot have a return to prosperity until the price level of general commodities has moved substantially upward and until many millions of these men who are now unemployed are put back to work. And the object of this bill which is before you is to accomplish those two results.

Whenever there is a great surplus of labor, whenever we are passing through a period of great depression, we always have cutthroat competition. It is inevitable. One man takes an order at a slightly less price than his competitor. In order to have a chance to break even on that low price he must not only use all the skill that he has but he must cut the pay of his working people. Then the other man, not to be outdone, cuts his price still further; and so the endless chain continues, of lower prices and lower wages, and lower wages and lower prices.

I believe the time has come when we must take out of competition the brutality of competition. We must take out of competition the right to cut wages to a point which will not give an American standard of living, and we must recognize that capital is entitled to a fair and reasonable return, and that therefore goods must be sold at a price which will enable the manufacturer to pay a fair price on his investment.

The antitrust laws were rightly enacted to prevent monopoly; but they have gone far beyond that. They have prevented agreements between parties which would make it possible to stop this cutthroat and deflationary process.

Now, I am not for one moment in favor of abolishing our antitrust laws. I believe that they should be retained on our statute books as a guarantee against the return of unregulated monopoly. On the other hand, I think the time has come when we should ease up on these laws and, under

proper governmental supervision, allow manufacturers and people in trade to agree among themselves on these basic conditions of a fair price for the commodity, a fair wage, and a fair dividend.

That, gentlemen, is the object of this bill. It does not propose any repeal of our antitrust laws. It simply provides that when groups of men in trade associations or otherwise have come together and entered into an agreement, and the Government has found that agreement to be in the public interest, that in such a case the antitrust laws should not prevent such contracts from going into effect. (p. 134)

• • • • • • • •

"Mr. Lewis. Mr. Harriman, I am going to ask you questions with regard to two phases of the bill. First, tell us what is understood by a trade association, giving an actual example, if you can.

Mr. Harriman. A trade association is a group of manufacturers or men employed in a given or common trade who unite for common benefits.

Mr. Lewis. Can you give us an example?

Mr. Harriman. Yes; the electrical-supply trade.

Mr. Lewis. How many such trade associations are operating in the United States today? An approximate estimate will be sufficient.

Mr. Harriman. I do not know, but I know there are a little over 400 who are members of the chambers of commerce.

Mr. Lewis. That is, trade associations?

Mr. Harriman. Yes.

Mr. Lewis. From your knowledge of those trade associations, as president of the chamber of commerce, how many of the three or four hundred would you say would respond voluntarily to the plan of this bill, to help carry out its purpose?

Mr. Harriman. I should think a great number of them would, and the big ones will rush to it. Those who are large employers, seeing great benefit to the country through increased buying power of the country, will rush to it. I would not be at liberty to name names, but I know of 8 or 10 trades that are now preparing their codes, whose employees run into the millions.

Mr. Lewis. That is the next subject I wish to discuss. A code of ethics or fair practices, as contemplated in this plan—have any such codes been worked out within a trade association that could be presented to the committee for its information?

Mr. Harriman. No. Probably none that would interest you, for the reason that the Federal Trade Practice Act that we now have on the statute books has been interpreted both by the courts and by the Federal Trade Commission in very narrow terms and has not been interpreted as covering broad basic elements such as minimum wages, maximum hours, and reserves for sickness, accident, and old age.

The present act is narrow in its scope. It has been confined very largely to questions of fair advertising, fair labor relief, minor matters, so far as the economics of the Nation are concerned.

I assume that if this bill is passed the trade codes will be divided into two parts. The first part will deal with labor conditions which are not covered today by any present act, and wages and hours and reserves.

The second part of the code will deal with these other matters, such as false advertising and similar items of not as great importance.

We conceive that what the Government is interested in and what trades are interested in is the basic question and not the minor questions, and that the first codes that will be submitted will cover nothing, or practically nothing, but the matter of wages and hours, and so forth, and those can go into effect very promptly. Then the refinements of the act can be developed later; that is the refinements of the codes can be developed later.

Mr. Lewis. There are some 1,500 trade cartels in Germany that resemble what is being undertaken under this bill. Do you know to what extent the German trades have worked out codes of ethics or fair practices?

Mr. Harriman. No; I do not." (pp. 152-153)

EXTRACTS FROM HEARINGS BEFORE THE COMMITTEE ON FINANCE, U. S. SENATE, INDICATING THE COMPETITIVE ABUSES SOUGHT TO BE REMEDIED BY THE NATIONAL INDUSTRIAL RECOVERY ACT.

STATEMENT OF THE HONORABLE ROBERT F. WAGNER, UNITED STATES SENATOR FROM NEW YORK.

"The national industrial recovery bill has as its single objective the wide-spread and permanent reemployment of workers at wages sufficient to secure comfort and decent living. This desired end is to be reached by a twofold program, involving, first, cooperative action within industry, encouraged by law and supervised by the President for the protection of the public, and secondly, direct Government expenditures for public works.

"The bill marks a far-reaching departure from the philosophy that the Government should remain a silent spectator while the people of the United States, without plan and without organization, vainly attempt to achieve their social and economic ideals. It recognizes that planlessness and disjunctive efforts lead to waste, destruction, exploitation, and disaster and that purposive planning awaits the substitution of regulated cooperation in place of the unlimited and frequently pernicious competition which we have heretofore regarded as the sole guardian of the public welfare. This trend in thought and action is accompanied by a widening concept of business—that all business is affected with a public interest. That is the necessary consequence of the growing complexity of our economic machinery and of the increasing interdependence between one State and all States, between one industry and all industries, between employment anywhere and employment everywhere. At the same time, the bill preserves as the central motivating theme of American industry and voluntary action and individual initiative which have contributed so markedly to our industrial progress. Competition is not abolished; it is only made rational. In this bill we say that business may not compete by reducing wages below the American standard of living, by sweating labor, or by resorting to unfair prac-

tices. Competition is limited to legitimate and honorable bids for the market and real gains in technical efficiency.

"The first title of the bill, which is devoted to promoting coordination within industry, illustrates the new blend of public and private action which is necessary today. In order that government may play its proper role, the bill centralizes authority in the President, with power on his part to set up the agencies and appoint the officers and employees necessary to carry out the new policy. He is authorized also to establish an industrial and planning research agency, to enlist the aid of the Federal Trade Commission for necessary investigation to modify or cancel any action taken under the bill, and to terminate the bill prior to its stated 2-year life by a declaration whenever the national economic emergency will have ended.

"Despite this centralized power, the emphasis is upon voluntary action. To make competition sane rather than blind and destructive, the bill allows any trade or industrial association or group to prepare and submit to the President for approval a voluntary code of fair competition. Such a code of fair competition will set forth the best judgment of those engaged in the particular trade or industry as to the competitive conditions within the industry, specifically (1) the standards of fair competition; (2) the trade practices which should be banned as unfair, oppressive and designed to give advantage to the employer with the lowest standards; (3) the methods which should be employed to rehabilitate the industry, increase its capacity to give employment, and raise the living standards of those who labor in it. These methods may include devices such as exchange of information, cooperative marketing, simplification of style, standardization of products, and many other features.

"When such a voluntary code is approved by the President, it becomes effective and binding upon the entire trade or industry and any action complying with it is exempted from the provisions of the antitrust laws. In this manner we lift the plane of competition to the level of the highest ideals prevailing in the particular industry, and at the same time we avoid the regimentation of all industry under a single inflexible set of rules. (pages 1 and 2)

* * * * * * * *

Senator Wagner: "Not at all. It simply plans a nationally planned economy, without which I predict we never can recover, because it is unfair competition, among other things, that struck us down. We are not seeking a change; we are seeking a rationalization of competition, instead of permitting the sweat-shop, by exploitation of labor, to break us down by its competition. Instead of that, we want to substitute competition in efficiency and on a high plane, where the laborer gets a just reward for his services." (page 6)

. . . . . .

"The bill is drawn to expire at the end of 2 years. It is frankly an experiment. But it is an experiment worth making, for our objectives are to preserve the merits of competition and to avoid its abuses, to multiply the opportunities for employment and to lift our standards of living. The bill establishes that exploitation shall no longer be an advantage in the race for success and that the highest ideals of those engaged in industry shall determine its standards of action." (page 7).

. . . . . .

STATEMENT OF JAMES A. EMERY, REPRESENTING THE NATIONAL ASSOCIATION OF MANUFACTURERS.

"First. These measures aim to create conditions that will put back to work and retain therein at better prices of pay the largest possible number of our people. To this end the measure purports to grant a new measure of self-organization for cooperation in industry that will set up codes of fair competitive practice, controlling the deadly downward spiral of prices and wages resulting in cut-throat competition for survival, which has completely demoralized the normal exchange of goods and services among our population." (page 274)

. . . . . .

"What may be included in codes of fair competition or permissible agreements is not defined in the bill but rests in the discretion of the administrator, upon the meaning

which may be given to the term 'fair competition' in the light of the objectives of the measure." (page 283)

* * * * * * * *

Mr. Emery. "I wish that were stated in the bill.

Senator Wagner. "You cannot put every word into the bill. Everybody knows it except those who are now attempting to conjure these imaginary arguments in order to defeat it.

Mr. Emery. "We are not conjuring up any imaginary arguments.

Senator Wagner: "We have had conferences, Mr. Emery, with you, and I think it was pretty definitely stated what the purposes were behind the bill, and that the thing was to lift up and to prevent this unfair competition and this exploitation of labor, and that will put competition on a fair, decent basis, for the smaller as well as the large, and my own view is that this is going to help the small business man as against the large business man. It is going to give the small business man a chance, because the hours of labor and wages have got to be practically the same in the same community.

Senator Reed. "If I may resume again, I would like to complete my thought. We have been sitting here for several days listening to representatives of the oil industry urge this sort of thing for their industry, appointment of a dictator to have the power to fix prices and regulate competition, and they are frank enough to tell us that their motive is to raise the price of oil from its present low level to manufacturers of Pennsylvania and elsewhere who favor this bill about a dollar a barrel. I have been approached by a good many because in their minds it is an indirect way of repealing the present antitrust laws, and I want to know how that strikes you.

Mr. Emery. "I want to be perfectly frank about it, as to what we assumed was going to be the effect of this measure. We assumed that one of the causes of the present depression was the deadly downward spiral of prices and wages, which has completely demoralized the normal exchange of goods and services among our population. In other words, as men on the ladder, they fought with all the means they had, they cut prices along until conditions became such that they were unable to pay labor, and the result

was a deadly downward fall in price levels. The effect is that you can do two things. You can compel competition to the death, on the one hand, and have regulation of competition under appropriate conditions. We believe men can be forced to form organizations in industry; that you can cause an effective measure of competition that will prevent the most destructive element that hits our consuming power and that is low wages."

* * * * * * * *

Mr. Emery. "I am sure you will agree with me that one of the most disastrous features of this depression has been that steady deadly competition that demoralized business, and every industry was overburdened with debt, and could not get the money to sustain them until we were all brought down on that level. So far as the people I represent are concerned—and we say it with as much interest in those to be protected as others—that the manufacturer who sells below cost is as much a liability or more so than an asset.

Senator Reed. "And if you establish a system of this kind, or like that in Germany, your cure is worse than your disease.

Mr. Emery. "The cure here is that you are after a reasonable amount of regulated competition between parties, but they must depend upon the administration of the bill. One thing certain about the bill is that the administrator must, if it is retained in the form it is now in, regulate working conditions and employment conditions and wages as now prescribed in the bill. Those are things he must do, and whether he does anything else depends on him." (pages 287, 288.)

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES CO. INC.,
Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,
Defendant-Appellee.

BRIEF ON BEHALF OF STATE OF NEW YORK.

Statement and Petition.

The State of New York, in the persons of the Attorney General and the Governor, were served with the Bill of Complaint, orders and other papers in the within proceeding and became parties thereto pursuant to Title 28, Section 380, of the United States Code. The plaintiff (appellant herein) attacks the validity of a state statute (Ch. 781, Laws of 1933 of New York) under the State Constitution (R., pp. 3-5).

Now comes the State of New York, by its Attorney General, John J. Bennett, Jr., Henry Epstein, Solicitor General, Solicitors, and asks leave to be deemed a party to the instant appeal and to submit the subjoined memorandum in support of the constitutional validity of Chapter 781, Laws of 1933, of New York State.

March 6, 1935.

JOHN J. BENNETT, JR.,
Attorney General,

HENRY EPSTEIN,
Solicitor General,
For State of New York, Appellee.

Basis of Appeal.

Appellant is a retail automobile dealer, selling the product of the Chevrolet Motor Company, a branch of the General Motors Corporation (R., pp. 4-5). The National Industrial Recovery Act (Title 15, United States Code; 48 Stat. 195), authorizes the creation of Codes of Fair Competition in the various industries and trades of the nation. Pursuant thereto, the Motor Vehicle Retailing Trade adopted such a code (R., p. 16) which was affirmed by the National Industrial Administrator and by the President of the United States (Oct. 3, 1933). By reason thereof it became effective as to interstate transactions in this trade.

New York State, by Chapter 781, Laws of 1933, enacted a State "Recovery Act" whereby the said code was available as the standard of fair competition in respect of intrastate retail sales of automobiles within New York State. The code became effective in New York State upon the filing of a certified copy with the Secretary of State, Dec. 3, 1933 (R., p. 33).

By reason of Article IV, subdivision A, and Article IV, subdivision B, paragraphs 1 and 2, of the said Motor Vehicle Retailing Trade Code, dealers selling new cars are prohibited from allowing more than an established maximum allowance for an old car traded-in as part payment for the new car purchased. The provisions for the sale of said new cars at list prices, plus certain fixed charges, and the prohibitions against rebates, gratuities and the like, are all related to the basic "trade-in" allowance question (R., p. 16).

Appellant seeks to sell new automobiles in New York State in violation of said provisions of the code,

contending that they are violative of its privileges under the Federal and State Constitutions, that they violate the National Industrial Recovery Act itself, that the said act is violative of the Federal Constitution, and that the State Act (Ch. 781, L. 1933) is violative of the State Constitution. The within action was brought to enjoin a threatened prosecution by the District Attorney of New York County under the State Act.

Scope of State's Brief.

The brief of appellee Dodge, District Attorney of New York County, will deal with the factual background leading to the enactment of the National Industrial Recovery Act, the necessity for stringent regulation of the retail automobile industry, as an integral and important phase of the automotive industry, and will discuss at length the position of the National Industrial Recovery Act and the Motor Vehicle Retailing Trade Code in relation to the Federal Constitution.

The following discussion will assume as its premise the constitutional validity of the National Industrial Recovery Act and the code approved pursuant thereto, in respect of *interstate and foreign commerce,* under the Constitution of the United States. On the basis of such assumption it will be herein argued that the State Recovery Act is a valid enactment under the Constitution of the State of New York.

This court may well withhold a determination of the validity of a state act under a state constitution when the issues could have been litigated in the state

courts and where such issue is now in other litigation pending.[1]

The appellant urges that the State Act is contrary to the provisions of the State Constitution. This court, while affirming the principle that enforcement of invalid statutes may be restrained (*Panama Refining Co. et al.* v. *Ryan, et al.*, 293 U. S. , decided Jan. 7, 1935), has also declared its reluctance to adjudge a state statute to be in conflict with the Constitution of the State before the question has been considered by the highest tribunal of the state—unless the case imperatively demands such a decision (*Louisville and Nashville R. Co.* v. *Garrett*, 231 U. S. 298, 304; *Liggett Co.* v. *Lee*, 288 U. S. 517). No such determination by the Court of Appeals of New York has as yet been made on the questions here involved.

There is present in the instant case no such urgent necessity as evidently prevailed in the *Louisville and Nashville R. R.* case (*supra*) to overcome lack of conclusive decisions in the state court. The findings indicate no such situation. No claim is made of compelling emergency. Generally such determination should be left within the jurisdiction of the highest state tribunal. The prospect or even possibility of a decision in the highest state court contra to that of this court on a state question should dictate circumspection in the interest of orderly judicial processes.

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[1] *Sherman* v. *Abeles*, 241 App. Div. (N. Y.) 676—affirmed the lower court and sustained the State Recovery Act (150 Misc. 497). Reversed on other grounds, the Court of Appeals not deciding the issue of the validity of the State Act, 265 N. Y. 383. *Matter of Sabatini* v. *Andrews*, Appellate Division, First Department, sustained State Act 243 App. Div. 109, opinion by Glennon, *J.*—Now pending before Court of Appeals—March Term. *Darweger* v. *Staats, et al.*, 153 Misc. 522;—lower court denied the validity of the State Act; affirmed by Appellate Division, Third Department (March 5, 1935)—arrangements made to present the appeal to the Court of Appeals on or before March 15th. *Gross* v. *Jamaica Auction Galleries*—Appellate Division, Second Department (273 N. Y. S. 376) reversed an order denying injunction and directed injunctive relief to restrain code violation.

Added weight is given to this suggestion in the adequate number of cases decided in the state appellate courts in favor of the propriety of the State Recovery Act. It is, therefore, respectfully urged that no determination be made, or consideration given by this court to the local question presented by appellant.

In the event, however, that this court sees fit to decide the state question of constitutionality under the state fundamental law, the following arguments are presented for the court's consideration.

POINT I.

Chapter 781 of the Laws of 1933 of the State of New York (State Recovery Act) constitutes a valid exercise of the State's legislative function.

The appellant urges that the State Act is contrary to the Constitution of the State of New York in two respects:—first, that the Act constitutes an improper delegation of legislative power; second, that it violates Article III, Section 17, of the State Constitution, which prohibits the incorporation by reference of an existing law. These contentions will be dealt with in this point.

Appellant's argument that the regulation of trade-in allowance values is violative of the Fifth and Fourteenth Amendments to the Constitution of the United States is dealt with fully in the brief of appellee Dodge, and therefore will be treated only incidentally in this brief.

A. The Emergency.

Chapter 781 of the Laws of 1933 became effective on August 26th, 1933, some two months after the

adoption of the National Industrial Recovery Act. Both laws were enacted during a period of grave economic crisis, with which both the Nation and the State were confronted. This critical condition called for the fullest exercise of the powers of the Federal and State Governments, in cooperation with each other and in cooperation with industry.

The effect of the emergency upon questions of constitutional limitations has recently been clarified by this court in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398. The doctrine reiterated in that case is to the effect that, although emergency does not call into existence any powers which the Constitution does not grant, the emergency does afford an occasion for a wider use of the powers which the Federal and State Governments already enjoy.

No one questions the existence of the power in the states to regulate business enterprises and contracts in such respects as the public welfare requires. No one will take issue with the finding of the New York Legislature that a state wide emergency existed which seriously threatened the welfare of the state. In the face of a critical emergency, which has caused widespread unemployment, grave distress, and the prostration of industrial enterprise throughout the state, there is no question that the state may exercise its conceded powers to an extent which normal conditions would not justify. In such a situation "either the rights of property and contract must * * * yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its

citizens the blessings of freedom and to promote the general welfare." *People ex rel. Durham Realty Corp.* v. *LaFetra*, 230 N. Y. 429, 443.

As was said by Chief Justice Hughes in *Home Building and Loan Association* v. *Blaisdell* (*supra*, at p. 439):

> "If state power exists to give temporary relief, from the enforcement of contracts in the presence of disasters due to physical causes, such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes."

This Court has already had occasion to take judicial notice of the critical conditions brought about by the present depression (*Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344; *Atchison, Topeka & Santa Fe R. R. Co.* v. *U. S.*, 284 U. S. 248, 260). The urgent public need which occasioned the passage of both the National and State Recovery Acts is too clear for argument. The wisdom of these measures is not a matter for determination by the courts.

B. The State Recovery Act—Its Principles and Purposes.

The State Recovery Act (Ch. 781, Laws of 1933) was passed at a special session of the Legislature in 1933 (see Appendix A for full text of the statute). The Legislative intent is clearly shown in the body of the law itself. Section 1 contains a most significant declaration of Legislative finding of fact and of policy:

"Section 1. *Legislative finding; statement*

of policy. A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the state of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the state of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York."

The New York Act thus declares the existence of a national emergency in the precise language of the National Industrial Recovery Act itself, and contains,

in addition, the finding that the emergency likewise exists in this state and affects the welfare and undermines the standards of living of the people of the State of New York. There is also the finding that the emergency and the causes and effects thereof, as declared in the National Act, relate as well to commerce in this state wholly intrastate in character.

The Legislature then declares the policy of this state (1) to cooperate in the furtherance of the objects and the purposes declared in the National Act; and (2) to make uniform the standards of fair competition prevailing in intrastate commerce with the applicable standards of interstate commerce provided for in the National Act.

Section 2 authorizes the Secretary of State to file certified copies of codes, agreements, rules and regulations adopted pursuant to the National Act, and provides, upon the filing of any such codes, its provisions shall be "the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character". The violation of any provision of any code, agreement, rule or regulation so filed is made a misdemeanor punishable by a fine of $500.

Section 3 of the New York Act vests the Supreme Court of the State of New York with jurisdiction to restrain the violations of any codes filed pursuant to Section 2.

Section 4 of the New York Act suspends the operation of the state anti-trust laws during the time that the act is in effect. The New York Act, by its terms, becomes ineffective contemporaneously with the expiration of the National Industrial Recovery Act.

On the same day that Chapter 781 became effective, Chapter 783 of the Laws of 1933 also became a law

of this State. By this Chapter, the State consented to the utilization of its own officers by the President in the effectuation of the purposes of the National Industrial Recovery Act (see Appendix B). This Chapter constituted complementary legislation to Section 2a of the National Act, which contemplates the utilization by the Federal Government of state and local officers with the consent of the states.

Analysis of these enactments makes it clear that the Legislature intended, in a period of critical emergency, to offer the fullest cooperation possible to the Federal Government in the achievement of the purposes of the National Industrial Recovery Act. The Legislature unquestionably desired that this State should do all within its powers to bring about the correction of economic conditions in trade and industry, within the state, which the Federal Government was seeking to realize through the National Act.

The New York Act, adopted some two months after the Federal Act, recognized the fact that codes were being prepared and adopted pursuant to the National Industrial Recovery Act and in accordance with the conditions and limitations therein imposed. It manifests an intention on the part of the Legislature to take advantage of the extensive administrative machinery which had already been established under the Federal Act. For the sake of uniformity in interstate and intrastate commerce, it adopted the Federal standard and the results of the administrative action contemplated by the National Act. Instead of setting up administrative agencies of its own, it adopted the policy of coordinating its activities with the procedural formula set up by the Federal Government. It provided that that procedural process should come into operation with respect to any given industry

upon the filing of a certified copy of the National Code for that industry in this State. Upon such filing, the agencies set up by the Federal Government to administer the code in interstate matters thereupon became the administrative agencies of the state to administer the code in intrastate matters.

The system was simple. It insured perfect harmony in coordinating the activities of both governments. It was the most effective way of attaining the purpose of the New York Act to make uniform the standards of fair competition.

Thus, the combined powers of the National and State government were harnessed in an attempt to alleviate the critical conditions which existed.

C. The Necessity and Reasonableness of the Regulations Attacked.

The principal regulations undertaken under codes of fair competition have been the establishment of minimum wages, maximum hours of employment, and the definition and proscription of unfair competitive practices which have been one of the basic causes of the disorganized condition in the several industries.

The particular regulation attacked in this case as violative of due process is the trade-in allowance provision of the code. The Court below found that the granting of excessive trade-in allowances in the sale of new automobiles far in excess of their actual resale value was the most serious and most destructive competitive practice in this trade. It found that eighty-five per cent. of all sales made by new car dealers are based on trade-in allowances on used cars and that the economic depression had so intensified and inflamed this destructive competitive practice that it had brought the industry to the point where it was

threatened with extinction and bankruptcy. In addition, the result of this particular method of unfair competition was to disorganize and disrupt the entire industry and to cause a sharp and drastic reduction of its wage and labor standards (Findings 24-37, Supplemental Record, pp. 18-19). The reasonableness of the regulation itself has been reviewed at length in the brief of appellee DODGE. In that brief also is to be found an exhaustive analysis of the relationship of this regulation to the problem of due process. It will be necessary here to discuss only very briefly the question of the power of the state to enforce this regulation and other forms of regulations adopted in the various codes and made effective by reason of the State Recovery Act.

The State of New York has adopted these codes under its own industrial recovery act. It has made these regulations under what is commonly known as its police power—the power which the Supreme Court has said is "the power to promote the general welfare" which "is inherent in government". It is, said the court, "the power of sovereignty, *the power to govern men and things within its own limits*".

Any doubt which may have existed that this power of sovereign states is not as broad as the exigencies which face them has been put to rest by the case of *Nebbia* v. *The People of the State of New York*, 291 U. S. 502. A statute passed by the State of New York was there upheld, which, among other things, fixed the retail price of milk and made the sale at different prices a criminal offense. The opinion of this court is so comprehensive and well-considered that it disposes of every argument made by the appellant on the question of due process.

This court reached the following conclusions:

1. *That no business or property right is immune from government regulation.* The government may prevent an individual from using his property to the detriment of his fellows and keep him from using his freedom of contract to work his fellows harm. Equally fundamental with the private right over property and enterprise is that of the public to regulate it in the common interest.

2. *That a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare and to enforce that policy by legislation adopted to its purpose.* The courts are without authority either to declare such policy, or when declared by the Legislature to override it. If the laws passed can be said to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.

3. *That no kind of business is immune from regulation by the state in the public interest.* No type of competitive practice within any industry is guaranteed against interference by the state when its evils in the opinion of the Legislature require that it be curbed.

The particular "economic maladjustment" which the Legislature regulated and which was upheld in the *Nebbia* case was that of price, but this court has upheld a wide variety of legislation enacted to deal with other evils which had arisen out of business enterprises and which public interests demanded be regulated. The wide scope of the regulatory power

of a state or the national government is indicated by the variety of statutes which have been upheld by the Supreme Court providing for the prohibition of child labor (*Sturges* v. *Beauchamp*, 231 U. S. 320), imposing restrictions upon hours of labor for adults (*Muller* v. *Oregon*, 208 U. S. 412); (*Miller* v. *Wilson*, 236 U. S. 373; *Bunting* v. *Oregon*, 243 U. S. 426), prescribing the form and actual amount of payment of wages to employees (*Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13), determining the time and manner of payment of minors (*McLean* v. *Arkansas*, 211 U. S. 539), fixing the size of a loaf of bread (*Schmidinger* v. *Chicago*, 226 U. S. 578), determining the compensation insurance for laborers injured by industrial accidents (*New York Central Railroad* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Arizona Employers' Liability Cases*, 250 U. S. 400) fixing the standard of quality of wares offered for sale (*Hippolite Egg Co.* v. *United States*, 220 U. S. 45; *United States* v. *40 Barrels and 20 Kegs of Coca-Cola*, 241 U. S. 265; *United States* v. *Johnson*, 221 U. S. 488; *Lawton* v. *Steele*, 152 U. S. 133).

In footnotes 24, 25 and 26 in the majority opinion in the *Nebbia* case will be found other cases upholding laws passed in the public interest which curtail property rights and place restrictions upon the freedom of contract.

Practically every type of regulation attempted under the Codes has been upheld at some time as within the scope of the police power of the states.

In the field of competitive practices the courts have sustained *legislation against the charge of lower prices in one locality than those exacted in another;*

Central Lumber Company v. *South Dakota*, 226 U. S. 157; prohibiting the *giving of trade inducements to purchasers or other types of price discrimination. Rast* v. *Van Deman and Lewis*, 240 U. S. 342. Types of *business combinations which ran counter to the declared economic policy of the Government have been validly proscribed under state and federal laws. Smiley* v. *Kansas*, 196 U. S. 447; *Northern Securities Company* v. *United States*, 193 U. S. 197, 332.

In the field of relations between employers and employees the public interest has likewise been recognized as justifying a variety of regulations. The courts have affirmed the power to limit hours of labor, *Holden* v. *Hardy*, 169 U. S. 366; *Bunting* v. *Oregon*, 243 U. S. 426; *Radice* v. *New York*, 264 U. S. 292; to prevent child labor, *Sturges* v. *Beauchamp*, 231 U. S. 320; to fix minimum wages, *Stettler* v. *O'Hara*, 69 Oreg. 519. See also *Wilson* v. *New*, 243 U. S. 332 sustaining a congressional law fixing wages and hours of labor on railroads.

The New York Constitution has no more stringent requirements for "due process" than the Fourteenth Amendment to the Federal Constitution or the similar limitations in other state constitutions. In general it requires that no one be deprived of personal property rights except by means and procedure reasonably adapted to the nature of the case.

The police power of the State of New York is no less broad than that of all proper governments. It embraces the whole system of internal regulation by which the state may subject persons and property to all necessary kinds of reasonable restraints and burdens in order to secure the general comfort, health and prosperity of the state. When the greater public interest requires it the property rights or liberty of

an individual may be restrained or taken away, even without compensation. No business or activity is beyond its reach when the public welfare becomes intimately concerned with it.

The error of assuming that the police power is limited to the objectives of health, morals and safety must be avoided.

> "It (police power) extends, as we have said, not only to regulations which promote the public health, morals and safety *but to those which promote the public convenience or the general prosperity*" (*Eubank* v. *Richmond*, 226 U. S. 137, 142). (Italics ours.)

D. THE PROPRIETY OF DELEGATING POWERS TO ADMINISTRATIVE AGENCIES.

Article III of Section 1 of the State Constitution provides:

> "*Section 1. Legislative Power.* The legislative power of this state shall be vested in the Senate and Assembly."

There is no essential difference between this organic precept and Article I, Section 1 of the Constitution of the United States, which provides:

> "Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The constitutional mandate being almost identical, the same test would be applied in the case of both laws. If the National Act is found to contain no improper delegation of power to the President—a point

fully argued in the brief of appellee Dodge—the State Act will equally withstand any attack on the ground that it is violative of Section 1 of Article III of the State Constitution.

Section 1 of the State Act, after the finding of emergency and the causes thereof, contains the explicit statements that it is "the policy of this State to cooperate in the furtherance of the objects and purposes declared in said act of the congress and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industries * * *".

While this definite statement of policy furnishes a standard and intelligible principle for the designated administrative agent, it is further clarified and limited by the requirement that the standards announced in Section 3a of the National Act must be conformed to. Section 2 of the State Act contains this express proviso:

> "Filing of Codes and Agreement.—1. The Secretary of State is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each Code, agreement, license, rule or regulation *in effect* pursuant to such act of the congress; * * *. Upon such filing of a copy so certified of a Code of Fair Competition for any trade, industry or subdivision thereof, *as approved by the President of the United States,* or of any agreement or license or any rule or regulation provided for under title one of the said national industrial recovery act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or sub-

division thereof in the state as to transactions intrastate in character, * * *."

There is, therefore, specific reference to the approval of the President of the United States under the limitations and conditions imposed upon him by the National Act. The substance of this provision, when combined with the statement of policy contained in Section 1, leads to the necessary conclusion that the Legislature of New York has made it a condition to the effectiveness of a code in intrastate commerce that its terms comply with the limitations set forth in the National Act. The right of the President to approve a code under the National Act is conditioned upon his compliance with the requirements of Section 3a particularly and with Sections 7a and 10b of that statute. A code could not be "in effect pursuant to such act of Congress" unless it met the conditions specified in Section 3a, including the making of definite findings by the President.

The intention of the Legislature was clearly expressed in the statute. It sought to prescribe, in order to obtain uniformity, the same details of fair competition as those included in the National Act. Such uniformity could not be achieved without assuming as a condition the limitations upon the right to approve and formulate codes contained in the National Act.

Passing for the moment the appellant's argument that the state legislature cannot delegate any powers to an administrative tribunal of another sovereignty, there can be no doubt that the regulations contained in the codes approved by the national administration must conform to prescribed standards, limitations and conditions before they can become effective in intrastate transactions. If the National Act is held

to set up adequate standards or limitations to presidential action, the State Act is equally valid.

The validity of the National Act as a proper delegation of legislative authority to the President has been, we believe, fully sustained by the decisions of this Court reviewed in the brief of appellee DODGE. Duplication of that argument is unnecessary. That analysis and the authorities cited therein equally sustain the validity of the State Act as a proper delegation.

The Court of Appeals of New York has also had frequent occasion to pass upon this question. These decisions equally sustain the validity of the State Act.

The leading authority in New York is the case of *Village of Saratoga Springs* v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123. This case involved the validity of the delegation of power to the Public Service Commission to fix minimum rates. The court held that the common law rule that a rate be reasonable would necessarily be implied even without special mention in the statute. It laid down the general rule in the following language (p. 144):

> "* * * While no consideration of convenience or of supposed necessity would justify us in ignoring any constitutional mandate or limitation, it must be remembered that we have no express constitutional provision on the subject, and that it is sought to condemn the legislation before us solely by extending the principle that the legislature cannot delegate legislative powers (a principle which, though unquestionably true, is, as we have seen, true only within limits) to a point that would render efficient legislation on the subject impracticable. It cannot be said, to use the language of Jus-

> tice HARLAN, that in any real sense the legislature has delegated its power to the commission. The statute is complete. The legislature, not the commission, has enacted that there shall be maximum rates for the charges of the gas and electric light companies, that light shall be furnished to consumers at those rates, and has provided the penalty for extorting greater charges for service. What is intrusted to the commission is the duty of investigating the facts, and, after a public hearing, of ascertaining and determining what is a reasonable maximum rate. I cannot see how the duty intrusted to the commission in this case differs in principle from that imposed on the president to determine that duties were reciprocally unequal or on the secretary of the treasury to determine what was inferior tea."

The rule is sustained by numerous authorities both before and after the decision of the Court of Appeals in the *Saratoga* case. Thus, in *People* v. *Long Island Railroad Co.*, 134 N. Y. 506, a statute empowering the Supreme Court or the County Court to order that gates be erected at the intersection of a railroad and a street was upheld; in *Matter of Gilbert Elevated Railway Co.*, 70 N. Y. 361, the right of the Rapid Transit Commissioners to designate the streets upon which the road was to be built was sustained; in *People ex rel. Doscher* v. *Sisson*, 222 N. Y. 387, the Court of Appeals upheld a statute giving the state excise commissioner power to suspend the sale of alcoholic beverages, in proximity to camps and munitions factories, during the World War; in *Matter of College of City of New York* v. *Hylan*, 205 App. Div. 372, aff'd 236 N. Y. 594, a statute providing that the trustees of certain colleges

in the City of New York should adopt schedules of compensation to be paid to teachers and employees and that the board of estimate and apportionment should pay such salaries out of tax monies was sustained; in *Cleveland* v. *City of Watertown,* 222 N. Y. 159, the Court of Appeals held that where the legislature provided certain forms of simplified government by statute and permitted any city of the second or third class to adopt any one of such forms, such a statute was not an improper delegation of legislative power; in *People* v. *Moynihan,* 121 Misc. 34, the court held that a statute giving the State Fuel Administrator power to regulate the use of fuel during the World War was not an improper delegation of legislative powers; in *Gardner* v. *Ginther,* 232 App. Div. 296, aff'd 257 N. Y. 578, the power given by the legislature to the Commissioner of Education to lay out school districts was sustained as being not an improper delegation of authority; and in the recent case of *Matter of National Surety Co.,* 239 App. Div. 490, the court sustained the power of the Superintendent of Insurance in carrying out the authority given him by the legislature to rehabilitate an insurance company.

A recent statement of the rule was made by the Court of Appeals in the case of *People ex rel. Doscher* v. *Sisson,* cited *supra.* There the court said at page 397:

> "* * * The legislature may validly appoint an executive agency to examine into and determine whether or not the facts existing warrant, as provided by the legislature, the operation or a suspension of the operation of a statute. The legislature, in the instant case, enacted

> on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to an executive agency the duty of bringing about the result it desired."

Examples of the delegation of legislative power, arising as they do as a result of the complexities of modern life, might be cited almost indefinitely. The exercise of this power in relation to the activities of Civil Service Commissions, Public Service Commissions, Boards of Education, Boards of Health, the Milk Control Board and similar administrative agencies is of such common knowledge that it is taken as a matter of course. The board or commission to make effective the standard set by the legislature is a necessity of modern life.

Both under the decisions of this Court and the State Court, the State Recovery Act contains adequate standards and limitations of power. Both the Federal and the State acts have the same legislative purpose. The codes are the rules and regulations which fill in the details of the statutes in accordance with the "primary standards" laid down by the legislative bodies. Both statutes do no more than to delegate the power to make the rules and regulations within prescribed limitations to administrative agencies. Not only precedent, but compelling necessity, support the form of delegation contained in both acts.

E. Reciprocal and Mutual Acceptance of State and Federal Agencies.

The appellant's most serious objection to the New York Act seems to be that it avails itself of the administrative machinery set up under the Federal

Act, instead of establishing a similar machinery of its own. This the appellant regards as complete surrender on the part of the State Government to the President of the United States. The appellant does not point to any constitutional inhibition against this form of legislation unless it be the claim of unconstitutional delegation of powers. It argues as if this effort at cooperation and the use by the State of the Federal administrative machinery were something unheard of and completely novel.

The adoption of federal laws by the states and, in the converse situation, of state laws by the Federal Government has been a more common practice than is generally realized.[2] There have been times in our history when less critical conditions have brought about joint federal and state legislation. There is

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Footnote 2: *Federal Adoption of State Laws, Present and Future.*

The Federal Government by a series of laws concluding in the Conformity Act, 17 Stat. 197 (1872) (Rev. Stat. Sec. 914, U. S. C. tit. 28 Sec. 724) adopted the laws of procedure of the states as controlling in the Federal courts. Analogous to the Conformity Act is the provision in the Revised Statute (Sec. 788) which provides that marshals of Federal Courts and their deputies shall have in each state "the same powers in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof" (U. S. C. tit. 28, Sec. 504). In its bankruptcy legislation it has adopted the exemption and priority provisions of state laws (30 Stat. 548, 563; U. S. tit. 11, Sec. 24, Sec. 104 (b) (5). Other examples of such action by the Federal government are as follows: Purity of elections (Rev. Stat., Sec. 5515); State criminal laws applicable to Federal territories such as Indian reservations and National Parks (35 Stat. 1145, U. S. C. tit. 18, Sec. 468) and (U. S. C. Title 16, Secs. 25, 59, 97, 126, 169, 375, 117b, 198b, 204b); quarantine laws (20 Stat 37, U. S. C. tit. 42, Sec. 86); prohibition of the transportation of goods in interstate commerce when such goods are produced or sold in violation of state laws, the Webb-Kenyon Act (39 Stat. 1058, 1069); the Lacey Act (31 Stat. 188). (U. S. C. tit. 18, Sec. 392); the Federal Migratory Bird Treaty Act (40 Stat. 755, U. S. C. tit. Sec. 705); interstate shipment of black bass (44 Stat. 576, as amended by 46 Stat. 845, U. S. C. tit. 16, Secs. 851-855).

Some of these statutes are examples of the actual adoption of state laws by the Federal Government while others are instances of conditioning the operation of the federal law upon the action of the states. Whether we speak of conditioning the operation of the federal law upon the state law or adopting a state law as a federal law the process is essentially the same since in either case the Federal Government is in effect adding its sanctions to the enforcement of state laws.

obviously no inherent objection to such joint action when the same end is sought by both governments as in the case of the Recovery Acts. As Chief Justice Marshall declared a "spirit of harmony and conciliation * * * ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other." *Gibbons* v. *Ogden*, 9 Wheat. 1, 206. See also *Second Employer's Liability cases*, 223 U. S. 1; *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211.

Under the Eighteenth Amendment several states passed laws giving state aid to the enforcement of prohibition. The courts have upheld the use of state agencies in aid of federal laws. *Ex parte Burke*, 190 Cal. 326. Counterfeiting federal money has been made a state offense in Ohio. See *Tox* v. *Ohio*, 5 How. 410, 434, in which such legislation has been sustained. States have aided the Federal Government in the exercise of the national power to declare war and raise armies. In *Gilbert* v. *Minnesota*, 254 U. S. 325 and *Halter* v. *Nebraska*, 205 U. S. 34, this type of legislation was held valid and proper.

Conversely the Federal Government has frequently lent its aid to help the policies of the states. In the days of state prohibition laws the Federal Government exercised its powers over interstate commerce to make more effective the enforcement of the state laws, *e. g.*, the Webb-Kenyon and Wilson Acts. See *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland Railroad*, 242 U. S. 311. So too Congress has legislated to help the states in dealing with the problems of stolen automobiles. It has invoked its power under the Interstate Commerce Clause to supplement the state police powers. This

has been upheld. See *Brooks* v. *United States*, 267 U. S. 432. This type of cooperative legislation is becoming more frequent as the problems facing the Government become more complex.[3]

Footnote 3: *State Acts Conforming to Federal Laws and Regulations—Present and Future.*

Adoption of Federal laws and regulations, past and future, by the states is scarcely a novel method of securing uniformity. The Eighteenth Amendment vested concurrent powers of enforcement in the federal and state governments. A number of states enacted statutes which adopted the provisions, either in whole or in part, of the National Prohibition Enforcement Act. (See 23 Col. L. Rev. 674 at 676 (1923)); Chamberlain, "Uniformity of Regulatory Laws Through Federal Models" (9 A. B. A. J. 383 at 383-384 (1923).) Again, fourteen states at present have provisions in their statutes authorizing automatic conformity to the federal regulations fixing open seasons under the Federal Migratory Bird Treaty Act. Several of these states also require automatic conformity to federal regulations on bag limits and possessions, and two of them adopted the federal regulations in their entirety. It is interesting to note the wording of the Mississippi Statute which reads as follows:

> "The Federal Migratory Bird Treaty Act and *Regulations* thereunder as presently provided for or as amended from time to time and proclaimed by the President are hereby made a part of this act" (Miss. Code of 1930 (1933 Supp.), Sec. 4705-09).

The South Carolina statute cited reads:

> "The Federal Migratory Bird Treaty *Regulations*, being the supreme law of the land under Article VI of the Constitution of the United States, *are hereby declared to be the law of this State*, and the penalty for their violation shall be punishment of not less than $10.00, nor more than $25.00 fine, or thirty days imprisonment" (1 Code of Laws of S. C. 1932, Sec. 1767).

A number of the states in the enactment of their narcotic laws have adopted some of the standards prescribed by administrative officers under the Federal Narcotic Laws. The Uniform Narcotic Drug Act which provides for the adoption of some federal standards under the Federal Narcotic Legislation has been adopted by Florida, Kentucky, Nevada, New Jersey, Rhode Island, South Carolina and Virginia.

The laws of the following states provides for the automatic adoption and recognition on the part of the state of all definitions and standards promulgated by the Secretary of Agriculture under the Pure Food and Drug Act: Alabama, Arizona, California, Florida, Idaho, Kansas, Maryland, Michigan, Minnesota, Missouri, Mississippi, Nevada, North Carolina, Oklahoma, Utah, Vermont, Virginia and Washington. The remainder of the states in their pure food and drug acts generally authorized the adoption of rules and regulations and provided that when definitions are adopted they shall be in conformity with those adopted for the enforcement of the Federal Act, provided they are not contrary to the state laws. Several states in their warehousing acts require the same license and bond requirements governing warehousemen qualifying under the Federal Warehousing Act. Federal grain standards under the Federal Grain Standards Act have been adopted by the various states and the

The desirability of the adoption and incorporation of present and future laws in the interest of coordination between the State and Federal Governments received full discussion in *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, *supra.* In that case the Court considered the Webb-Kenyon Act (37 Stat. 699, Chap. 90) which forbade interstate transportation of intoxicants intended to be received, possessed, sold or used in violation of any law of the

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same is true of Federal vegetable and fruit grading standards. Nearly all of the states of the Union have adopted laws of this type. Some of the oil producing states have provisions in their conservation statutes adopting and making automatically effective the rules and regulations of the Department of the Interior. See (Ely, Oil Conservation Through Interstate Agreement 258 (1933)).

In the field of aviation law there has been a most interesting development: a majority of states require pilots to be licensed and aircraft to be registered in accordance with the Federal regulations concerning these matters, and some have adopted in addition the Federal Air Rules. In 1933 thirty-four states and territories required federal aircraft and airmen licenses for all operations within their borders, eleven required federal licenses for commercial aircraft operations, and four required either federal or state licenses for all aircraft operations (4 Air Commerce Bull. 508-535 (1933) (See, State Adoption and Enforcement of Federal Air Navigation Laws, 16 A. B. A. J. 715 (1930)).

In recent years there have been many examples of federal aid legislation whereby the Federal Government makes grants-in-aid to the states provided the states match the federal grants and accept the terms upon which they are offered. By means of these devices the Federal Government has induced the states to accept federal policies and standards with respect to such matters as forest fire prevention, the organization and training of the militia, agricultural expansion work, the construction and maintenance of improved highways, vocational education, vocational rehabilitation, the organization and maintenance of employment bureaus, the treatment of venereal disease and instruction in the hygiene of maternity and infancy. In all of these cases the states have adopted federal legislative policy and administrative determinations in their efforts to cooperate with the Federal Government. We are now witnessing a very rapid expansion of this and similar types of legislation in connection with old age pensions, unemployment insurance, housing laws, banking acts, mortgage laws, etc.

Not all of the illustrations given above are cases in which the states have imposed a penalty for the same act already penalized under federal laws and regulations. The criminal features are absent in the Federal Aid Legislation and in some of the other illustrations given. The states were adopting, as a rule of conduct for those engaged in intrastate commerce, federal policies and standards, the violation of which was a federal crime when committed within the state by those engaged in interstate commerce. The illustrations support a general practice of adoption by the states of federal legislative policies and application of federal administrative standards.

state of destination. The opinion in that case contains the following language:

P. 326:

> "The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. In fact, the contention previously made, that the prohibitions of the state law were not applicable to the extent that they were broader than the Webb-Kenyon Act, is in direct conflict with the proposition as to delegation now made.
>
> So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play,—that its provisions apply to all the states,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself."

P. 330:

> "And that Congress had the right to enact this legislation making existing and future state prohibitions applicable was the express result of the decided cases to which we have referred, beginning with *Re Rahrer,* 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865."

P. 331:

> "Or, in other words, stating the necessary

result of the argument from a concrete consideration of the particular subject here involved, that because Congress, in adopting a regulation, had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce co-operation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution."

While *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, is not applicable because the decision was based upon the duty of Congress to retain exclusive jurisdiction over maritime affairs, the dissenting opinion of Justice Holmes in that case is pertinent (p. 169):

"I thought that *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 61 L. ed. 326, L. R. A. 1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, went pretty far in justifying the adoption of state legislation in advance, as I cannot for a moment believe that, apart from the 18th Amendment, special constitutional principles exist against strong drink. The fathers of the Constitution, so far as I know, approved it. But I can see no constitutional objection to such an adoption in this case if the act of Congress be given that effect. I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the states, and not for any purpose of affecting the law of the United States, I take

it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what, for the time being, exists. A familiar example is the law directing the common-law practice, etc., in the district courts, to 'conform, as near as may be, to the practice, etc., existing at the time' in the state courts. Rev. Stat. §914, Comp. Stat. §1537, 6 Fed. Stat. Anno. 2d ed., p. 21. This was held by the unanimous court to be binding in *Amy* v. *Watertown,* 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530. See *Gibbons* v. *Ogden,* 9 Wheat. I, 207, 208, 6 L. ed. 23, 72, 73; *Cooley* v. *Port Wardens,* 12 How. 299, 317, 318, 13 L. ed. 996, 1004. I have mentioned the scope given to the saving of a common-law remedy, and have referred to cases on the statutes adopting state pilotage laws. Other instances are to be found in the acts of Congress, but these are enough. I think that the same principle applies here. It should be observed that the objection now dealt with is the only one peculiar to the adoption of local law in advance. That of want of uniformity applies equally to the adoption of the laws in force in 1917."

See also *U. S.* v. *Hill,* 248 U. S. 420, upholding the Reed Amendment to the Webb-Kenyon Act.

The reason behind this method of law making is "uniformity" of regulation and coordination of the activities between Federal and State Governments in dealing with the serious and complex problems of modern society. The cases just discussed lay down the principle that there is no inherent objection to this method of cooperation.[4]

This reasoning is even more effective in the case

Footnote 4: See article by Charles A. Beard, 25 Political Science Review, page 61.

of state legislation subjecting intrastate transactions to the laws and regulations of the United States applicable in interstate commerce. Uniformity is more likely through cooperation of the states to the one single Federal standard than by virtue of uniformity of Federal law to numerous state laws.

The question of using Federal administrative agencies to carry out the legislative purposes of the state seems entirely unobjectionable. This Court has on several occasions sustained the use of state agencies for the administration of Federal legislation. (See *Holmgren* v. *U. S.*, 217 U. S. 509.) In *Arver* v. *U. S.*, 245 U. S. 366, at 389 this Court summarily dismissed as "too wanting in merit to require further notice", the contention that an act was void because it delegated to state officials federal power. As already shown it has for reasons of practical necessity become a common practice for the states to enlist the aid of Federal administrative agencies in the enforcement of their own laws and in prescribing the rules or regulations to make these laws effective. See, for example, Chap. 233 of the Laws of N. Y. of 1928, which in effect, designated the Federal Government as the agency to prescribe rules to govern the granting of licenses to aviators in "intra state flying". This type of legislation was recently sustained in *Swetland* v. *Curtis Airports*, 41 Fed. (2nd) 929, injunction modified 55 Fed. (2nd) 201. In that case the Court said (p. 939):

> "The act manifests an intention on the part of the Legislature to take advantage of the extensive administrative machinery which had been established by the Department of Commerce under the enabling provisions of the Air Commerce Act of 1926."

See also *Watkinson* v. *Hotel Pennsylvania,* 195 App. Div. 624, aff'd 231 N. Y. 562, where the Legislature accepted the provisions of any law of the United States making appropriations to be apportioned among the states for vocational rehabilitation of disabled persons.

Further support for the method of legislation here adopted is to be found in tax statutes which ascertain the charges to be made on the basis of variable foreign legislation. This type of legislation has been regularly sustained on the theory that the Legislature has not surrendered its power, but simply has chosen the alien statute as a point of reference to secure convenient flexibility.

Florida v. *Mellon,* 273 U. S. 12 (federal statute allowing credit on federal estate tax for estate taxes paid under state law).

People v. *Goldfogel,* 242 N. Y. 277 (property tax based on amount of moneyed capital of private banks in competition with national banks).

Home Ins. Co. v. *Swegert,* 104 Ill. 653 (retaliatory tax statute on foreign corporations to equalize local tax with that of other states).

Underwood Typewriter v. *Chamberlain,* 94 Conn. 47 (corporate tax of 2% of net income on which corporations pay tax to U. S. [affd. 254 U. S. 113]).

Hagood v. *Doughton,* 195 N. C. 811 (estate tax equal to the full percentage of federal estate tax allowed as credit of the Federal Government for payment of tax to state).

Brown v. *State,* 323 Mo. 138 (estate tax equal to full percentage of Fed. estate tax allowed as a credit by Federal Government for payment of tax to state).

Phoenix Ins. Co. v. *Welch*, 29 Kan. 672 and

People v. *The Fire Assn. of Phila.*, 92 N. Y. 311, affd. 119 U. S. 110 (retaliatory tax statute).

Texas Co. v. *Diehinson*, 79 N. J. L. 292 (foreign corporation retaliatory taxes).

In *People* v. *The Fire Assn. of Phila.* the New York Court of Appeals said (p. 322):

> "A law may be made to fit a changing event, and follow it, and adjust itself to it, through a series of future mutations, and those, too made by foreign legislation, or the voluntary action of other bodies."

It is extremely questionable whether these cases which refer to tax statutes and ascertainment of amounts payable to the State or Federal Government can be differentiated from any other broad adoption of the laws or regulations of a state or the Federal Government. Reasonableness, convenience and economy have been used as arguments in these cases. The same compelling reasons exist for legislation in the form of the State Act.

The New York legislation finds additional substantial support in the authorities which permit varying degrees of delegation to private or non-governmental groups.[5]

Footnote 5:

Nicchia v. *N. Y.*, 254 U. S. 228;
Fox v. *Mohawk & H. River Humane Soc.*, 165 N. Y. 517;
People v. *Griswold*, 213 N. Y. 92;
Grannan v. *Westchester Racing Co.*, 153 N. Y. 449;
American S. P. C. A. v. *City of N. Y.*, 205 App. Div. 335;
Champlain Refining Co. v. *Corp. Commission of Okla.*, 286 U. S. 210;
Eubank v. *Richmond*, 226 U. S. 137;

and see discussion and collection of cases in 32 Columbia L. R. 80.

Certainly the State should be as free to delegate the administration of its laws to Federal administrative authorities as to private groups.

In *Gima* v. *Hudson Coal Co.*, 310 Pa. 480, the state Anthracite Mine Law provided that when mine explosives were used the manner of storing, keeping and moving the same should be in accordance with special rules furnished by the manufacturers. It was contended that this constituted an unlawful delegation of legislative power to private persons. In dismissing the contention the Supreme Court of Pennsylvania said:

> "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. *To deny this would be to stop the wheels of government.*" (Italics ours.)

The theory adopted by the New York Act is the only practical method which could bring about the intention of the Legislature as expressed in the statute. Just as it would have been impossible for Congress to have performed the duties conferred upon the President by the National Act, it was likewise impossible that the Legislature of this State would have achieved the purposes set forth in its law without the use of the Federal administrative machinery. The establishment of a complete administrative organization by the State of New York which would in every respect parallel the National Recovery Act would have been a duplication of organization, officers and expense and have constituted sheer waste. Moreover, uniformity in standards would have been impossible.

If appellant's argument be sound, it would be virtually impossible for the Legislature to achieve the object of the statute. The machinery set up under this Act was the only feasible method of accomplishing the purpose. To have restricted the Legislature to the adoption of only those codes in existence at the time of the passage of the statute would have required new legislation with each succeeding code or regulation, or would have meant the limitation of such aid and cooperation within a closely restricted sphere of industrial activity. Confusion, inefficiency and waste would have resulted. The very important element of flexibility so essential in this code making process, would have been sacrificed. The broad program sought to be accomplished would not possibly have functioned if the Legislature had to pass a new law upon the adoption of every new code or every amendment thereto.

It is concluded by the respondent that the State of New York has an inherent right to coordinate its laws and policy with that of the National Government by making a blanket adoption of the administrative acts, pursuant to the National Industrial Recovery act. The emergency conditions described in another part of this brief merely land reason and necessity to this form of legislation.

In view of the fact that approximately 600 codes were formulated under the President's guidance, pursuant to the National Industrial Recovery Act, the form of the State Act appears to be the only feasible method for making the State's economic edicts within the state conform with those in interstate transactions and in interstate commerce generally.

Quite apart from the direct right of a legislature, under circumstances such as these, to harmonize its

activities with the already supreme law of the land, according to the theory that has its basis in Justice Holmes' dissenting opinion in *Knickerbocker Ice Co.* v. *Stewart, supra,* it is clear that the Legislature of the State of New York had the privilege of delegating certain of its duties to the President of the United States and that this was done with due regard for the proper restrictions that exist upon the right of the Legislature so to do.

The appellant's brief characterizes the New York Act as "a penal statute" and contends that it is violative of the State Constitution in that it delegates the power to create a crime. Great stress is placed upon the fact that the rule or regulation was not in existence at the time when the criminal penalty was prescribed in the Act. We believe that the Court will sustain the State's position that the statute contains adequate standards, and that the State may properly delegate power to the Federal Administration. Having reached that conclusion, no difficulty will be found with this last argument of the appellant.

The real problem is whether there is a proper delegation of legislative power to the administrative agency to make the rules and regulations. Obviously, if the Legislature sets a standard and delegates power to an agency to realize that standard through action of its own, the rules to be adopted by the agency to achieve the standard set by the Legislature cannot be in existence at the time of the enactment of the statute. As a matter of absolute necessity, such rules and regulations must come into existence at a time subsequent to the making of the law.

If the objection of the appellant is sound, the Legislature would first be required to set a standard and delegate its power to an agency, the agency would

then adopt rules to attain the standard and the legislature would then be required to prescribe a criminal penalty for the violation of those rules. The great objection to this course of proceeding is that where the legislature delegates power to an administrative agency it usually does so because the subject involved in the delegation is one which requires continuous attention and the standard set by the legislature can be attained only by a succession of rules and regulations. If a criminal penalty could be attached to the violation of each rule and regulation only after its adoption, one of the main purposes for the original delegation of power would be defeated.

The legislature provides for this situation by enacting in the original law that a violation of any rule or regulation adopted by its agent shall be a crime and this procedure has become so usual that it excites no comment.

The whole question of the power of the legislature to enact laws to come into effect upon the happening of some future event is well summed up by the Court of Appeals in the case of *People* v. *Fire Association of Philadelphia*, cited *supra*. There the court stated at page 319 of its opinion:

> "* * * Most laws are made to meet future facts. * * * Such contingency may sometimes be, instead of a certain and definite fact, one which is variable and changeable. The legislation suited to such a fact and adapted to such a future emergency may properly recognize its movable character, and be itself made flexible to the changing emergency, and this very characteristic is the product of legislative will and discretion rather than a surrender of it."

Numerous authorities sustain convictions for violations of rules and regulations made by administrative agencies to which legislative power had been properly delegated. *U. S.* v. *Grimaud*, 220 U. S. 506; *Avent* v. *U. S.*, 266 U. S. 127; *Nebbia* v. *People of State of N. Y.* (*supra*); *People* v. *L. I. R. R. Co.*, 134 N. Y. 506; *People* v. *Dempsey*, 224 N. Y. 140; *Polinsky* v. *People*, 73 N. Y. 65. The contention that by reason of the penalties provided in the act itself the codes are "penal statutes" is, therefore, unsound.

Inasmuch as the National Recovery Administration has encouraged the states to enact cooperative recovery acts, it cannot be objected that Congress intended to occupy the entire field to the exclusion of state action (see Sec. 2 (a) of National Industrial Recovery Act; *Clark Distilling Co.* v. *Western Maryland R. R. Co.*, 242 U. S. 311; *Mintz* v. *Baldwin*, 289 U. S. 346; and see 34 Columbia Law Review 1077, 1080-1081).

F. Section 17, Article III of the State Constitution.

A further technical objection made by appellant is that the State Act violates Article III, Section 17 of the State Constitution, which provides as follows:

> "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act."

The Code which is made enforceable under Section 2 of the State Act is not an "existing law". There is no incorporation of the National Industrial

Recovery Act, as indeed there cannot be as it refers to interstate commerce whereas the State Act specifically limits its own terms to intrastate matters. The term "existing law" appears to have no application to enactments of bodies other than the New York Legislature. *Watkinson* v. *Hotel Pennsylvania,* 195 App. Div. 624, 231 N. Y. 562, and *People* v. *Davis,* 78 App. Div. 570.

In *Watkinson* v. *Hotel Pennsylvania, supra,* the court had before it "an act to accept the provisions of *any* law of the United States making an appropriation to the states for the rehabilitation of physically handicapped persons * * *," and it provided, among other things, that "the State of New York, through its legislative authority: (1) *accepts the provisions of any law of the United States* making appropriation to be apportioned among the states for vocational rehabilitation of disabled persons; (2) empowers (a certain designated board) to cooperate with such agency as the Federal Government shall designate to carry out the purpose of such law" (3) directs the payment of money to be received from the United States *"in the manner provided by such act"* (of Congress) for the purposes therein specified.

The Appellate Division for the Third Department held, and the Court of Appeals unanimously affirmed, that the statute was not repugnant to either Sections 1 or 17 of Article III of the Constitution.

In *People* v. *Davis,* 78 App. Div. 570, it was held that an act of the Legislature that the "Sanitary Code in the City of New York" shall be "deemed in full force and operative in the City of New York" and other similar legislation with respect to the same Sanitary Code did not violate the above mentioned constitutional provision because

> "the Sanitary Code, when declared to be binding and in force was not an existing law of the state within the meaning of that section of the Constitution, * * *" (at p. 576).

Section 17 of Article III has been given a very limited application by the New York Constitution. "It is obvious that it does not apply to an act purporting to amend existing laws * * *." (*People ex rel. N. Y. Electric Lines* v. *Squire*, 107 N. Y. 593, 602); it has been held that acts which provide for better means of carrying out, or for the enforcement, of previously enacted statutes, need not incorporate the previous statutes and, further, that previous statutes may be made applicable, merely by reference, for the purpose of providing means and methods of carrying out a new law (*People ex rel. Emerson* v. *Lorillard*, 135 N. Y. 285; *People ex rel. Commissioners* v. *Banks*, 67 N. Y. 568.

In *People ex rel. N. Y. Electric Lines* v. *Squire*, *supra*, the Court said (p. 602):

> "The object and intent of the constitutional provision was to prevent statute law relating to one subject from being made applicable to laws based upon another subject, through ignorance and misapprehension on the part of the legislature and to require that all acts shall contain within themselves such information as should be necessary to enable it to act upon them intelligently and discreetly."

The National Industrial Recovery Act is not a law "based upon another subject" from that contained in the State Recovery Act. The latter Act contains within itself all "information" necessary to have enabled the legislature to act "intelligently and

discreetly". No doubt of the subject matter of the National Act could have existed. The identity of the subject and full knowledge on the part of the legislature regarding it is clearly expressed.

Conclusion.

Contending, as we do, that Chapter 781 of the Laws of 1933 of the State of New York was correct in conception and form, was within every requirement of the State Constitution as to its content and purpose and the method adopted to fulfill the same, and that the sovereign powers of the State in the premises have not been exceeded but in fact and law have not nearly thereby approached their limit, we feel justified in respectfully urging that this Honorable Court will find that said Chapter 781 of the Laws of 1933 is a valid and constitutional law in all respects and this we ask without recourse to any plea of sentiment or reference to the consequences of an adverse ruling, but solely upon well founded constitutional grounds.

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Appendix A.

CHAPTER 781.

AN ACT to provide for codes of fair competition for trades, industries and subdivisions thereof, agreements, licenses, rules and regulations pursuant to the provisions of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. **Legislative finding; statement of policy.** A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the state of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the state of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intra-

state in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York.

Section 2. **Filing of codes and agreements.** 1. The secretary of state is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each code, agreement, license, rule or regulation in effect pursuant to such act of the congress, pertaining, affecting or in any way relating to the conduct of business in the state and duly certified as a true copy of such document or documents by the officials in charge of the administration of the provisions of title one of the said national industrial recovery act or by their duly authorized agent. Upon such filing of a copy so certified of a code of fair competition for any trade, industry or subdivision thereof, as approved by the president of the United States, or of any agreement or license or of any rule or regulation provided for under title one of the said national industrial recovery act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, and any violation of any provision of such code, agreement, license, rule or regulation

shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense, and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.

2. The secretary of state shall cause to be printed a sufficient number of copies of each such code, agreement, license, rule or regulation and the same shall be kept available for distribution upon request therefor.

3. If in any such code, agreement, license, rule or regulation, power is conferred upon any person or group of persons to subpoena witnesses, compel the production of books, papers and records, the attendance of witnesses or to take their testimony, a like power shall be deemed to have vested in such person or group of persons with regard to matters and things of a wholly intrastate character.

Section 3. **Jurisdiction of court.** The supreme court of the state of New York, is hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition, agreement, license, rule or regulation, filed pursuant to this act, and to prevent and restrain the commission within this state of any act tending to defeat or hamper the operation and effectiveness, within the state, of such act of the congress at the instance of any party whose interests are or may be adversely affected by such violations or acts. Nothing in this section contained, however, shall in any wise affect the criminal liability for violations of such codes, agreements, licenses, rules or regulations. Provided, however, that nothing in this act shall be construed by any public official or court

as declaring illegal the right of workers to organize; to adopt a constitution and by-laws and enforce the same and the right to control and direct the members of such organization in accordance with such constitution and by-laws; that no provision of this act shall be construed to compel workers or employees to continue at their work; or to declare an act illegal of an organization to collectively cease work, or its officers directing the cessation of work of its members.

Section 4. **Products of individual labor.** Nothing in this act shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this act prevent anyone from marketing or trading the produce of his farm.

Section 5. **Exemption from anti-trust laws; application of labor laws.** While this act is in effect and for sixty days thereafter, any code, agreement, license, rule or regulation in effect under this act, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of article twenty-two of the general business law, or of any other provisions of law, to the extent that such provisions of law are inconsistent with the provisions of such code, agreement, license, rule or regulation. Nothing in this act contained, however, shall be construed in any way to alter, modify or affect the provisions of existing laws of this state in such manner as to permit any change in public utility rates except with the permission and approval of the public service commission or as to lower the standards therein provided with regard to labor, hours of labor, wages for labor and employment of females and children.

Section 6. **Effect of the issuance, suspension or revocation of licenses.** 1. The license required of and obtained by any person pursuant to paragraph (b) of section four of said act of the congress shall be deemed to include business engaged in or carried on by him of a wholly intrastate character, and with respect thereto such person shall be subject to all the terms and conditions expressed therein and shall be entitled to all the privileges and immunities granted thereby.

2. The failure to obtain such a license or the suspension or revocation by the president of the United States of any such license shall preclude such person from engaging in or carrying on any business of a wholly intrastate character.

3. Any person who engages in or carries on any business in this state in violation of subdivision two of this section shall, upon conviction thereof, be fined not more than five hundred dollars and for each day such violation continues a separate offense, subject to the fine herein prescribed, shall be deemed to have been committed.

Section 7. **Letting of public contracts.** Every department, board, bureau, agency, authority, commission, public body or officer of the state or of any political subdivision thereof or district therein charged with the duty of letting or awarding contracts for (a) the construction, alteration or repair of public works or (b) the purchasing of materials or supplies, shall, notwithstanding any inconsistent provision of law, let or award such contracts only to such persons or corporations, otherwise qualified, who or which will agree in and by the terms of such contract to use or supply only articles, materials and supplies which

have been or will be mined, produced, manufactured or supplied, as the case may be, by a person or corporation who or which is a party or subject to a code of fair competition, agreement or license, approved, prescribed or issued under the said national industrial recovery act for the trade, industry or subdivision thereof mining, producing, manufacturing or supplying such articles, materials or supplies.

Section 8. **Duration.** This act, in so far as it affects agreements, codes, rules or regulations, shall become ineffective contemporaneously with the expiration of said national industrial recovery act, provided for by section two (c) of said act, and in so far as it affects licenses, contemporaneously with the expiration of the said national industrial recovery act, as provided for in section four (b) of said act.

Section 9. **Effect of partial invalidity.** If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of this act, and the application of the provisions thereof to other persons or circumstances, shall not be affected thereby.

Section 10. This act shall take effect immediately.

Appendix B.

CHAPTER 783.

AN ACT providing for the granting by the state of its consent to the president to utilize state and local officers and employees, pursuant to the provisions of the national industrial recovery act, enacted

by the Congress of the United States on June thirteenth, nineteen hundred and thirty-three

Became a law August 26, 1933, with the approval of the Governor. Passed three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The state hereby consents to the exercise of the power and authority vested in the president, pursuant to the provisions of title one, section two (a), and of title two, section two hundred and one (a) of the national industrial recovery act, enacted by the congress of the United States on June thirteen, nineteen hundred and thirty-three, to utilize, with the written consent of the governor, such state and local officers and employees as the president may find necessary and to prescribe their authorities, duties, responsibilities and tenure. The consent of the state hereby granted shall cease and terminate when such respective titles of the said national industrial recovery act shall cease to be in effect.

§2. This act shall take effect immediately.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES COMPANY, *Appellant*,

v.

WILLIAM C. DODGE, District Attorney, *Appellee*.

SUPPLEMENTAL BRIEF OF APPELLEE ON JURISDICTION.

DAVID BLITZER,
HAROLD H. STRAUS,
STANLEY OSSERMAN,
KARL D. LOOS,
Attorneys for Appellee.

March 28, 1935.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In The

Supreme Court of the United States

October Term, 1934.

No. 567.

Spielman Motor Sales Company, *Appellant*,

v.

William C. Dodge, District Attorney, *Appellee*.

SUPPLEMENTAL BRIEF OF APPELLEE ON JURISDICTION.

STATEMENT OF THE CASE.

This case arises on direct appeal from the decision of a specially constituted District Court of three Judges in the Southern District of New York, dismissing a Bill of Complaint against the District Attorney of New York County seeking to enjoin him from the enforcement of the Code of Fair Competition for the Motor Vehicle Retailing Trade under the statute of the State of New York known as the Schackno Act which is quoted in full at p. 10, Appendix B, Vol. 2 of our original brief. The appeal was docketed on December 8, 1934, and probable jurisdiction noted on December 10th, 1934. A supplemental record was filed February

23rd, 1935. Subsequent to the filing of the supplemental record briefs on the merits were filed by both parties. Neither brief discussed the jurisdiction of the lower Court to entertain the bill of complaint or the jurisdiction of this Court to entertain the direct appeal.

The case came on for argument on March 11th, 1935, and during the course of the argument questions regarding jurisdiction were raised by the Court. The Court directed that briefs be filed on the question of jurisdiction of the three Judges under Section 266 of the Judicial Code (U. S. C. Title 28, section 380), on the propriety of the direct appeal from the decree of the District Court under that Section and also with respect to the jurisdiction of the Federal Court as a Court of Equity upon the allegations that are presented by the record. The case was thereupon continued pending further order of the Court.

This brief is filed pursuant to the foregoing direction of the Court. In addition we have discussed the questions relating to the supplemental record which were raised during the oral argument.

SUMMARY OF ARGUMENT.

POINT I. The District Attorney of New York County is an officer of the state within the meaning of Section 266 of the Judicial Code. (pp. 6-25)

Historically the Attorney General of the State was the prosecuting officer of New York County, being succeeded in 1813 by a district attorney who continued to exercise the same functions.

The District Attorney continues, in special cases, as an assistant of the Attorney General.

The District Attorney has complete authority of all prosecutions for crimes and offenses cognizable in the Courts of New York County; and in misdemeanor cases (violations of the State Recovery Act are misdemeanors) is the only officer who can prosecute in the name of the People of the State.

The decisions of the New York Courts classify the district attorney as an officer of the State.

Fellows v. *Mayor*, 8 Hun. 484.
People v. *Nicoll*, 32 N. Y. S. 279.
Lincoln Constitutional History of New York, pp. 529, 722.

Cases holding section 266 inapplicable on account of the character of the defendant officers are limited to those against officers acting for and on behalf of a local subdivision of the state where the subject matter is only of local interest.

Ex parte Collins, 277 U. S. 565.
Ex parte Public Bank, 278 U. S. 101.
Henrietta Mills v. *Rutherford County*, 26 Fed. (2d) 799.
Pender County v. *Garysburg Manufacturing Co.*, 50 Fed. (2d) 732.
Pleasant v. *M. K. & T. R. Co.*, 66 Fed. (2d) 842.

Here the statute is of statewide application and the question of its validity is one of the most important occupying and dominating contemporary thought and attention.

The District Attorney of New York County is acting for and on behalf of the State, representing it in the performance of a state function and exercising a part of the sovereign power of the state, and even though considered a local officer, is an officer of the state in the performance of the functions which this suit seeks to enjoin.

The Attorney General can not institute prosecutions for misdemeanors and the act of joining him as a party would not give jurisdiction to a three judge court, and unless the District Attorney is considered an officer of the State, Section 266 would be inapplicable to suits to enjoin statutes of New York State in a class of cases of the highest importance to the State.

POINT II. The supplemental record should be accepted and the appeal considered as one from a decree entered after final hearing and upon the findings of fact contained in the supplemental record. (pp. 26-30)

All proceedings taken were by consent of all parties and the findings were entered *nunc pro tunc* as of a date preceding the final decree.

The supplemental record supplies findings of fact which should have been entered at the time of the decree.

> *Public Service Commission* v. *Wisconsin Telephone Company*, 289 U. S. 67.
> *Bordens Farm Products Company* v. *Baldwin*, 293 U. S. 163.

Omissions may be supplied by *nunc pro tunc* orders entered by consent of the parties.

> *Insurance Company* v. *Boon*, 95 U. S. 117, 123-127.

The findings of fact entered by the lower court are merely the recording of conclusions of fact at which the court must have arrived as the basis for the opinion rendered herein.

Hearings upon application for preliminary injunction may be treated by consent of the parties as final hearing and findings entered upon the evidence presented by the affidavits filed.

> *Hines Trustees* v. *United States*, 263 U. S. 143, 145.

The supplemental record presents a complete record upon which the questions of constitutionality may be determined in the light of the application of the statute to the facts and avoids the delays incident to futile appeals from interlocutory orders.

> 10 *American Law Institute Proceedings*, 33-34.

There is no precedent which prevents acceptance of the supplemental record.

POINT III. The general equity jurisdiction of the federal courts may appropriately be exercised in this case. (pp. 30-34)

Appellee filed motion to dismiss and objected to the juristion of the Court below on the ground that the relief sought was prohibited by Section 265 of the Judicial Code and that appellant had an adequate remedy at law.

When the lower court assumed jurisdiction, appellee being desirous of facilitating a final decision upon the validity of the statute and codes which he is enforcing in New York County, agreed to the entry of findings of fact as upon final hearing.

In so doing appellee intended to waive the general jurisdictional questions which had been raised by his motion to dismiss.

Reynes v. *Dumont*, 130 U. S. 354, 395.
Singer Sewing Machine Co. v. *Benedict*, 229 U. S. 481, 484.
American Mills Company v. *American Surety Company*, 260 U. S. 360, 363.

If findings of fact in the supplemental record are to be given effect the case is brought within the rule permitting equity to enjoin institution of criminal procedings.

Ex parte Young, 209 U. S. 123.
Hygrade Provision Co. v. *Sherman*, 266 U. S. 497, 500.
Truax v. *Raich*, 239 U. S. 33, 37-39.
Packard v. *Banton*, 264 U. S. 140, 143.
Terrace v. *Thompson*, 263 U. S. 197, 214.

This case presents a question of vital importance which should be decided in order to remove uncertainty and doubt which are seriously interfering with the adequate enforcement of Codes of Fair Competition and appellee therefore does not press the jurisdictional objections.

POINT I.

JURISDICTION OF THE THREE JUDGE COURT.

The District Attorney of the County of New York has continuously, practically from the date of the creation of the office, considered himself a State officer. He has consistently maintained that position both in Court proceedings and in his representations to the Legislature of the State of New York. For that reason he did not object to the jurisdiction of the Statutory Court on the ground that the defendant was not within the class of persons described in Section 266 of the Judicial Code. The appellee believes that the action of the District Court in convening a Court of three Judges was proper and that a direct appeal from the decision thereof lies to this Court.

It will be shown that historically and functionally the position of the District Attorney as a State officer is clearly supported, and that the decisions of the Courts of New York State have formally determined that such is his position.

History.

Upon the organization of New York as a State in 1777, the office of Attorney General existed, that of District Attorney did not. The Attorney General was the chief legal representative of the people in the courts and had statewide jurisdiction over all prosecutions. In 1796 New York State was divided into seven districts outside the County of New York and to each an assistant Attorney General was appointed. In New York County the Attorney General continued to officiate personally as the public prosecutor.

The office of District Attorney is derived from that of the Attorney General. At its inception he was designated an assistant attorney general and was appointed for districts. The office of District Attorney was first created by Chapter 146 of the Laws of 1801; the incumbents were appointed to conduct criminal prosecutions in the same districts as those for which the assistant attorneys general had been appointed. The district attorneys so created in

1801 were the successors of the assistant attorneys general, with the same powers and duties. The Attorney General remained the public prosecutor for the City and County of New York. By this Act the Attorney General could likewise be directed to conduct general prosecutions in any of the districts, and the District Attorney of the district was required to assist him.

With the growth of population and the development of the State, the seven districts during this period of regional attorneyships were increased to thirteen. The Attorney General himself continued to exercise all functions of prosecution in the County of New York until 1813. The direct succession of the office of the District Attorney of the County of New York, in place of that of the Attorney General, was accomplished by Chapter 66 of the Laws of 1813, which provided for the appointment of a District Attorney for the district designated as the City and County of New York, in addition to the others that had been previously created by the Act of 1801, and subsequent amendments. The District Attorney was required by the Statute of 1813 to conduct all criminal prosecutions in the County of New York; the Attorney General was relieved from personal attendance unless directed by the Governor or a Judge of the Supreme Court to attend.

By Chapter 283 of the Laws of 1818, it was provided that a District Attorney be appointed for each county of the state. The appointment of these District Attorneys was made by the Governor and the Council of Appointment until the Constitution of 1821 when the County Courts were vested with the power of appointment. The Constitution of 1846 made the office an elective one, and it so continues today. (See Constitution of 1894, Article X, Subdivision 1; Appendix A, p. 35.)

Thus the office of District Attorney originated as an assistant of the Attorney General, the functions of the District Attorney of New York County being performed by the Attorney General himself from 1777, when the state gov-

ernment was formed, to 1813 when provision was first made for a District Attorney of New York County. In special cases and when the Governor requires the Attorney General to attend any particular cause the District Attorney continues to be the assistant of the Attorney General. See: *Lewis* v. *Carter*, 220 N. Y. 8, 12-14; *People* v. *Kramer*, 33 Misc. 209, 212-216; Lincoln's Constitutional History of New York, Vol. II, Chapter 9, Article 5—State Officers, Section 2, pages 526-531.

Duties and Functions of the District Attorney.

By Chapter 283 of the Laws of 1818, which provided a district attorney for each County, each District Attorney was clothed with complete authority to conduct all prosecutions for crimes and offenses cognizable in the Courts within his jurisdiction including all offenses against State Statutes. A general provision of this character, prescribing the duties of the district attorneys, was continued in force from time to time, and is now contained in the County Law (Laws of 1909, Chapter 16, Appendix p. 41). The general provision in the County Law does not apply to the District Attorney of the County of New York. Other Statutes of general application make it clear that the District Attorney of New York County is the prosecuting officer and all crimes triable in the Courts within the County of New York must be prosecuted by him (see Appendix 42):

The District Attorney is the only officer who ordinarily enforces a State statute within the County of New York. The Attorney General of the State when so required by the Governor may prosecute particular cases in any County, but a formal authorization by the Governor is necessary. (Executive Law, Section 62, Subd. 2, Appendix A, p. 38; *People ex rel. Osborne* v. *Supervisors*, 168 App. Div. 765, 767). There are also some special classes of cases which the Attorney General is authorized to prosecute in all of the Counties such as crime against the elective franchise; but prosecutions for violation of the State Recovery Act

are not within these special classes. When acting in such special cases or upon requirement of the Governor, the Attorney General or his deputy becomes the chief prosecuting officer for the case and the District Attorney is his assistant. (Executive Law, Section 62, *supra.*)

The State Recovery Act does not designate what officer shall enforce the law through prosecution of offenses that may be committed. Only in the event that the Statute specifically designates the Attorney General as the enforcing officer, would there be any duty resting upon him. In the absence of specific designation, the duty of the enforcement of the State's criminal statutes rests upon the District Attorney and upon no one else.

Considering all of the statutes together, it is clear that the District Attorney of New York County is the sole officer charged with the duty of enforcing by Criminal proceedings State Statutes (subject to the special exception already noted) in the Courts of New York County. If the Attorney General participates in any such prosecutions, he may do so only when formally required by the Governor.

The Decisions of the State Courts.

In *Fellows* v. *Mayor*, 8 Hun. 484, it was held that an Assistant District Attorney was a State officer.

The Court said on this point:

> "The question presented in this case is whether the plaintiff was or was not a state officer while holding a position as assistant district attorney. It is conceded that the district attorney is a state officer. It could not well be questioned. (Rev. Stat., Vol. 1, p. 96, Edn. Vol. 1, p. 98, paragraph 15.) • • • "

Further speaking of assistant district attorneys, the Court said on page 486:

> "• • • They are connected with and made a part of the department of an *officer of the state*, connected with its judicial system and performing many of his duties

with the same effect as if he discharged them personally. They are his assistants *and not officers of the City or County.*"

In a later case in 1891, the Supreme Court in New York County also held that the District Attorney was a State officer; *People ex rel Lyon* v. *Nicoll*, 32 N. Y. S. 279. In that case the Court denied an application for mandamus to compel the District Attorney to reinstate the relator to a position held by him in the District Attorney's office, the application being based on Chapter 119 of the Laws of 1888 which forbade the discharge of a veteran from any position by appointment in any City or County. With respect to the claim that the position was one in a county, the Court said on page 280:

"* * * Upon the other question namely, the one of law raised, the application must be denied. The district attorney's office is not a public department or a department of public works, but a state office, classified by the Revised Statutes as a judicial office. 1. Rev. St. (Banks & Bros., 8th Ed.), page 369; *Fellows* v. *Mayor*, etc., 8 Hun. 484. The case of the relator is not therefore within the operation of Chapter 119 of the Laws of 1888."

The statute* relating to public officers in force at the time of the decisions in the *Fellows* and *Nicoll* cases above quoted, was contained in Chapter V, of the Revised Statutes, pertinent excerpts from which are set forth in the Appendix. (pp. 36-38) That statute classified civil officers in four classes, namely, legislative, executive, judicial and administrative. District attorneys for each county were listed in the class of judicial officers. Section 15 of Title I

*The statute referred to in both of the above quotations was that provision of Chapter V of the Revised Statutes which classified the district attorney of the several counties as "in the class of judicial officers" (See Appendix, p. 36). The reference to paragraph 15 at page 98 of Edmonds' Statutes cited in the quotation from the first of the above cases, was from Chapter V, Title IV, Section 15 which provided for the appointment and qualification of a district attorney. (See Appendix, p. 37)

of Chapter V provided that certain officers, including district attorneys, were so far local, as to require the residence of every person holding such office within the county in which the duties of his office are required by law to be executed. (See Appendix, pp. 36-37.)

This classification of district attorneys as judicial officers and the provision last mentioned, to the effect that district attorneys were local officers in the sense above indicated, was contained in the statutes at least as early as 1859 (See Banks & Brothers, Fifth Edition, Section 13) and continued in substantially the same form until 1892 when the Public Officers Law in substantially the same form as at present was enacted. The new Public Officers Law became Chapter VII of the Revised Statutes instead of Chapter V. It is now Chapter 47 of the Consolidated Laws. This statute abandoned the four classes of officers and by Section 2 defined all public officials as either "state officers" or "local officers". (See Appendix p. 39.)

The definition of state and local officers as contained in the present Public Officers Law was based upon the territorial extent of the jurisdiction of the respective offices rather than upon the nature of the functions they exercised. This is evident not only from the language of the definition itself but from the context of the subsequent sections in the Public Officers Law. The only occasion for the use of the terms defined is to prescribe the residential requirement for officers (Section 3) and to fix the place for filing records relating to the various offices. In defining the term "local officer" there are three classifications, namely, (1) every other officer who is elected by the electors of a portion only of the state, (2) every officer of a political subdivision or municipal corporation of the state and (3) every officer limited in the execution of his official functions to a portion only of the state. Only those officers falling within the second of the three classes would necessarily be officers of a subdivision of the state as distinguished from officers of the state. Those falling within the first or third of the above

classes might be officers of the state having a local jurisdiction or they might be officers of a subdivision of the state. The definition does not determine in which group they should be placed. Thus while the district attorney of New York County would come within the term "local officer" as defined, it is entirely consistent with the definition to consider him an officer of the state whose jurisdiction is limited to a local subdivision of the state and who is elected by a portion only of the state electorate.

In cases arising since the enactment of this statute and relating to the District Attorney there has not been any occasion to determine whether the District Attorney was an officer of the State from the standpoint of the nature of the functions he exercised.

In the first case, *People ex rel. Gardinier* v. *Supervisors,* 134 N. Y. 1, the question was whether the County should bear the expense incurred by the District Attorney in extraditing a fugitive from justice. The Court said that the District Attorney was a County officer and had been such since 1818 (the year that provision was made for the appointment of a District Attorney for each County instead of one for each of the several districts). The opinion of the Court however, clearly indicated that the District Attorney was performing a State function in extraditing the fugitive. The decision was merely that under the statutes allocating expenses as between County and State, expenses of this particular character were to be borne by the County.

In *People ex rel Eldred* v. *Palmer,* 154 N. Y. 133, 137, there was no discussion as to whether the District Attorney of Kings County was a State or a County officer. The Court referred several times to the District Attorney and other County officers, but the case did not call for any decision as to the character of the office held by the District attorney.

In *People ex rel Crane* v. *Taylor,* 17 Misc. 505, 508; 40 N. Y. S. 321, the question was whether or not the District Attorney was a City officer; it was held that he was not a

City officer but was described as a County officer. However, here again, there was no occasion for considering the question as to whether he should be considered an officer of the State rather than an officer of the County.

The question has been considered by the Attorney General of the State (Opinions Attorney General 1924, p. 119). There the question was whether a District Attorney might accept an increase in compensation authorized during his term of office. The Attorney General reached the conclusion that whether the District Attorney be considered a County officer or a State officer, he was unable to accept the increased salary. On the question of whether the District Attorney was to be considered a State officer, the Attorney General said:

> "It has been held that a District Attorney is a State and not a County officer. Fellows v. Mayor, 8 Hun. 484. This decision was never appealed, and there has been no definite adjudication of the point. Its theory seems sound, but it is not necessary to discuss it under the terms of the present inquiry."

From the foregoing review of the statutes and decisions, it seems clear that the definition of state and local officers contained in Section 2 of the Public Officers Law cannot be conclusive upon the question here presented, as to whether the District Attorney of New York County is an officer of the State within the meaning of Section 266 of the Judicial Code. The classification provided in the Public Officers Law was clearly based upon the extent of territorial jurisdiction. Surrogates who are elected by the electors of a portion only of the electorate of the State and whose jurisdiction is confined to a single County are held to be judicial officers of the State. See *Prendergast* v. *Coholan*, 101 Misc. 712; 166 N. Y. S. 263; affirmed without opinion 226 N. Y. 636.

It is apparent as a matter of history that the Attorney General of the State of New York once exercised all the

essential functions of the present office of District Attorney. He continued to exercise these functions throughout the State until 1801 and in New York County until 1813. The growth of the State and the consequent increase in public prosecutions required a division of the Attorney General's paramount authority into smaller units and among a number of men and this division followed county lines. The power of each District Attorney, within his own jurisdiction, was not less than that theretofore possessed by the Attorney General and the exercise of that power was limited only geographically by the district boundaries. In all other respects the District Attorney was, as the Attorney General had been before him, a State Officer, charged with the enforcement of the State laws and the prosecution of any violation of those laws which occurred within his jurisdiction.

In Lincoln's Constitutional History of New York (1822-1894), Vol. 2, Chapter 9, the author in the section entitled "State Officers," says:

> "The Supreme Court in Fellows v. New York, 8 Hun. 484, (1876) held that the office of district attorney was a state office, and a part of the state judicial system. The public officers law (1892) defines a local officer as one 'elected by the electors of a portion only of the state.' This clearly includes the district attorney, but notwithstanding this definition he must still be deemed a part of the judicial system of the state, and therefore, in a general sense, a state officer. The definition in the public officers' law should doubtless, be limited to its apparent purpose of classifying certain officers as distinguished from others designated as state officers, and the definition need not be construed as an attempt to define the status of the district attorney in his relation to other parts of the judicial system. The evolution of the office from that of the attorney general, whose place he takes and whose functions he performs in the county, shows that, although the method of selection has been changed from state to local authority, the inherent quality of the office has not been

changed, and it may still be classed among state officers, except with reference to the method of choosing an incumbent. The legislative intent on this subject is further manifest from the executive law (1892) which makes it the duty of the attorney general, whenever required by the governor, to attend any court of oyer and terminer, appear before the grand jury and take charge of a criminal prosecution then pending; and while so attending for this purpose he shall exercise all the powers conferred on the district attorney, and that officer become subordinate to the attorney general in such a case, and subject to his direction" (pp. 529-30).

Again in Volume 4 of the same work on pages 722-723, the author states:

"The district attorney is a state officer and an assistant appointed by him is also a state officer. The district attorney is an officer of the state connected with its judicial system."

Thus the district attorney from the standpoint of the historical development of the office, the nature and character of the functions exercised, and the classification of duties as between State officials and County officials, is an officer of the State in the prosecution of offenses committed against the State.

Section 266 of the Judicial Code.

Section 266 of the Judicial Code (U. S. Code, Title 28, Section 380) provides:

"No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state nor restraining the action of any officer of such state in the enforcement or execution of such statute, * * * shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any Judge thereof, or by any Circuit Judge acting as District Judge, upon the ground of the unconstitutionality of such statute,

unless the application for the same shall be presented to a Justice of the Supreme Court of the United States, or to a Circuit or District Judge, and shall be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, * * * Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Governor and to the Attorney General of the State, and to such other persons as may be defendants in the suit: * * * An appeal may be taken direct to the Supreme Court on an order granting or denying, after notice and hearing, an interlocutory injunction in such case * * *. The requirements respecting the presence of three judges shall also apply to the final hearing of such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

In *Ex parte Public Bank*, 278 U. S. 101, 104, the foregoing section was construed as follows:

> "It follows that, giving effect to the phrase in question, Section 266 requires the concurrence of two things in order to give the three-judge court jurisdiction: (1) the suit must seek to have a state statute declared unconstitutional, or that in effect, and (2) it must seek to restrain the action of an officer of the State in the enforcement of such statute" (p. 104).

In that case it was held that the Collector of Taxes of the City of New York was not such "an officer of the State" when seeking to collect taxes assessed pursuant to a State statute but for the sole use of the City.

In *Ex Parte Collins*, 277 U. S. 565, it had been held that the three-judge court was not required to hear an application for preliminary injunction on a bill of complaint to enjoin a municipality and its officers and a contractor from proceeding under a resolution adopted by the City directing the paving of a street. In that case the Court said:

"And likewise it has been held that the section does not apply where, as here, although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved. Despite the generality of the language, we think the section must be so construed" (p. 568).

Commenting upon the reasons for the enactment of Section 266 of the Judicial Code and its several amendments, the Court continued:

"Congress realized that in requiring the presence of three judges, of whom one must be a Justice of this Court or a circuit judge, it was imposing a severe burden upon the federal courts. The burden was imposed because Congress deemed it unseemly that a single district judge should have power to suspend legislation enacted by a State. That the section was intended to apply only to cases of general importance is shown by the provision that notice of the hearing must be given to the Governor and the Attorney General—a precaution which would scarcely be deemed necessary in a suit of interest only to a single locality. Support for that view is found also in the provision for a stay of the suit in case there shall have been brought in a court of the State a suit to enforce the statute or order. That the provisions of Section 266 applied to cases of unusual gravity was recognized by Congress in 1925, when, in limiting the right of direct appeal from the District Court to this Court, it carefully preserved that right in cases falling within the section. Cases like the present are not of that character. If the temporary injunction had been issued, the result would have been merely to delay a municipal improvement. Though here the alleged unconstitutionality rests in the enabling statute, the case does not differ substantially from one where the sole claim is that a city ordinance is invalid. Moreover, the enabling act is not itself being enforced within the meaning of Section 266. That act merely authorizes further legislative action to be taken by the city, as by the resolution here in question. It is

> that municipal action, not the statute of a State, whose 'enforcement, operation, or execution' the petitioner seeks to enjoin.

The only doubt that can exist as to whether the instant case falls within the provisions of Section 266 is as to whether the District Attorney of New York County is "any officer of such state." This question was expressly left open by the opinion of the Court in *Ex Parte Public Bank, supra*, when the Court said:

> "Our attention is directed to several cases disposed of under Section 266, where this Court passed on the merits although the suits were against local officers. We do not stop to inquire whether, at least in some of these cases, the so-called local officers in fact represented the state or exercised state functions in the matters involved and properly might be held to come within the provision of Section 266 now under review" (p. 105).

Decisions Prior to Ex Parte Public Bank.

The other cases to which the Court referred in the above quotation, included a suit against the District Attorney of New York County to restrain enforcement of a provision of the New York Rent Law of 1920, *Marcus Brown* v. *Feldman*, 256 U. S. 170. There the District Attorney was joined with other defendants. The other defendants were tenants in a building and the District Attorney was the only public official named as a defendant. Only by reason of his inclusion could the jurisdiction of the three-judge court and the direct appeal to this Court be sustained. There the relief sought against the District Attorney was to enjoin him from enforcing the provisions of Chapter 951 which made it a misdemeanor for a lessor to wilfully fail to furnish services required by the lease. There as here, the object of the suit was to prevent the District Attorney from prosecuting for misdemeanor. The question of the character of the District Attorney's office was not discussed in the

Court's opinion and apparently not raised in the pleadings or argument by the parties.

The earlier cases* also include three other suits in which the District Attorney of New York County was a party, namely, *Packard* v. *Banton*, 264 U. S. 140; *Hygrade Provision Company* v. *Sherman*, 266 U. S. 497; and *Tyson* v. *Banton*, 273 U. S. 418. In all of these cases other parties, instantly recognizable as state officers, were joined as parties defendant. In the first two cases the Attorney General was joined and in the last, the Comptroller of the State. In the last case specific relief was sought against the Comptroller of the State and he was unquestionably a proper party. However, in the other two cases, no special relief was sought against the Attorney General and in view of the fact that the sole duty of prosecuting for misdemeanors rests upon the District Attorney of the County where the offense is committed, it seems doubtful whether the Attorney General was a necessary or proper party. Certainly relief against him alone could not have prevented prosecution by the District Attorney of New York County and in the absence of any duty on the part of the Attorney General to prosecute for the commission of the misdemeanors defined by the statutes there in question, the jurisdiction of the three-judge Court and the direct appeal to this Court could not have been supported simply by the inclusion of a

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*Other earlier cases involving prosecuting officers in other States in which this Court assumed jurisdiction of a direct appeal and passed upon the merits, include the following: *Douglas* v. *Noble*, 261 U. S. 165, in which the sole defendants were the prosecuting attorney and the deputy prosecuting attorney for King County, Washington; *Gulf Fisheries Company* v. *MacInerney*, 276 U. S. 124, in which the sole defendant was the District and County Attorney for Galveston County, Texas; *Fenner* v. *Boykin*, 271 U. S. 240, in which the sole defendants were the Solicitor General of the Atlanta Judicial Circuit and the Sheriff of Fulton County, Georgia. The Solicitor General was evidently the prosecuting officer for a district embracing several counties of the State. *Cline* v. *Frink Dairy Company*, 274 U. S. 445, where the sole defendant was the District Attorney for the City and County of Denver, Colorado; *Rast* v. *Van Deman*, 240 U. S. 342, where all the prosecuting attorneys and tax collectors of the various counties and circuits of Florida were defendants.

In none of these cases was there any discussion in the opinion of the Court regarding the character of the office of the defendant and an examination of the record in the several cases indicates that no question in relation thereto was raised by the pleading or by the briefs.

state officer against whom no relief could be granted. See *Oklahoma Gas Company* v. *Packing Company*, 292 U. S. 386, 391. It should be noted, however, that none of these questions were raised by the parties either in brief or on the pleadings. In *Packard* v. *Banton*, the bill of complaint (paragraph 6) alleged that defendants, as the law enforcing officers of the State of New York intended to enforce the provisions of the law and had announced that they would prosecute if the law was not complied with. The allegations of this paragraph were expressly admitted by the answer of the defendant, Attorney General. *In Hygrade Provision Company* v. *Sherman*, the bills of complaint alleged that the Attorney General was threatening to enforce the law, and the defendants filed motions to dismiss.

Cases Subsequent to Ex Parte Public Bank.

The question of the character of a defendant's office has been presented in two cases since *Ex Parte Public Bank* but has not been expressly decided. In both cases the defendants were chief police officers and not prosecuting attorneys. In *Broad-Grace Arcade Corporation* v. *Bright, et al*, 284 U. S. 588 (per curiam), a suit was brought against the Mayor, the Director of Public Safety and Chief of Police of Richmond, Virginia, to enjoin the enforcement of the Virginia Sunday Observance statute. In the lower court jurisdictional questions were raised but not decided, the opinion stating:

> "The jurisdiction of the court with reference to the amount involved, the character of the defendants as state or municipal officers, and the right of the complainant to equitable relief, has been questioned; but these matters need not now be discussed, because we are of the opinion that, on the merits, the complainant is not entitled to the relief which it now seeks." (48 Fed. (2d) 348, 349).

In the statement in support of jurisdiction filed by the appellant in this Court, the point was made that the appellee, especially the Chief of Police, was a state officer, citing *Sherry* v. *Lumpkin*, 127 Va. 116, 124; *Burch* v. *Hardwicke*, 30 Gratt. (Va.) 24 and Section 2991 of the Virginia Code. Appellee did not dispute the proposition so advanced. By per curiam opinion, this Court affirmed the order denying an interlocutory injuction,

> "but without prejudice to the power and duty of the District Court, as specially constituted, to inquire and determine whether the Court has jurisdiction both in relation to the amount involved in the controversy (citing cases) and with respect to the right of complainant to maintain this suit in equity."

The fact that this Court in its order of remand referred to only two of the three jurisdictional questions mentioned by the lower court, omitting any reference to the question of the character of the defendant Chief of Police as a state officer gives rise to the possible inference that the Court was of the opinion that the defendant in that case was an officer of the State within the meaning of Section 266 of the Judicial Code.

In *Ratta* v. *Healy*, 288 U. S. 593, 289 U. S. 701, suit was brought against the Chief of Police of Manchester, New Hampshire, to enjoin enforcement of the New Hamphire hawkers and peddlers statute which imposed a penalty for selling without a license in the form of a fine of not more than $200.00 to be equally divided between the State and the Town in which the offense was committed. In the Court's order noting probable jurisdiction (288 U. S. 593), the Court directed argument upon the question, among others,

> "whether the defendant-appellant is a state officer within the meaning of Section 266 of the Judicial Code as amended."

That question was argued in the briefs of both parties but it was not decided as the appeal was dismissed for want of jurisdiction on the ground that the application for interlocutory injunction had not been pressed but had been waived and there was, therefore, no ground for direct appeal to this Court. (289 U. S. 701.)

The Rule Applied to the Present Case.

From the foregoing decisions, the rule as developed to date appears to be that a suit should not be heard by three judges when the suit is against an officer acting on behalf of a political subdivision of the state and the subject matter is of interest only to such subdivision and not to the state as a whole. The cases holding a three-judge court unnecessary are limited to cases of that character. In *Ex parte Public Bank, supra,* the suit was against the Tax Collector acting for and on behalf of the City of New York seeking to collect taxes for the sole benefit of the city. In *Ex parte Collins, supra,* the suit was against a municipality to enjoin the paving of a street, a matter of strictly local interest. In *Henrietta Mills Company* v. *Rutherford County,* 26 Fed. (2d) 799, *Pender County* v. *Garysburg Manufacturing Company,* 50 Fed. (2d) 732 and *Pleasant* v. *M. K. & T. R. R. Co.,* 66 Fed. (2d) 842, the suits were against counties and officers acting for and on behalf of the county to collect county taxes.

It has never been held that an officer of limited jurisdiction when acting for and on behalf of the state in the performance of a state function was not within the term "officer of the state" as used in Section 266. The proper construction of that term is the officer charged with the enforcement of the state statute. The implication of the statement in the opinion of this Court in *Ex parte Public Bank,* namely:

> "We do not stop to inquire whether, at least in some of these cases, the so called local officers in fact rep-

> resented the state or exercised state functions in the matters involved and properly might be held to come within the provision of Section 266 now under review."

is that even local officers should be included within the term when performing the functions of the state. This view is supported by *Suncrest Lumber Company* v. *North Carolina Park Commission*, 29 Fed. (2d) 823, where the Circuit Court of Appeals of the Fourth Circuit held that members of the North Carolina Park Commission were officers of the state within the meaning of Section 266. That decision was based on the proposition that the defendants there occupied positions created by the state law which involved the exercise of a portion of the sovereign power of the state and with the performance of which the public is concerned.*

Certainly a criminal prosecution for violation of a state law brought in the name of the people of the State is the exercise of a part of the sovereign power of the state and a prosecuting officer in the performance of such duties is exercising a state function and acting for and on behalf of the state.

In the case at bar the sole defendant named in the bill of complaint is the District Attorney for the County of New York. The object of this suit was to restrain the enforcement of the state statute, Chapter 781 of the Laws of 1933 of the State of New York, an act of state-wide application. This statute is not limited in any way to "matters of interest only to the particular municipality or district in-

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*The Court there said:

> "And when we consider the reason and spirit of the statute, which has been incorporated in the Judicial Code as section 266, we think that defendants are clearly officers of the state within its meaning. That statute was enacted because it was thought unseemly that one District Judge should stop the officers of a state in the enforcement of its laws, and thereby in effect set aside the deliberate act of its Legislature. The defendants here have been expressly designated by the Legislature to carry out the park project upon which the state has embarked in co-operation with the state of Tennessee and the national government. They represent, not a county or locality, as in the Henrietta Mills Case, *supra*, but the state itself, and an injunction restraining them would in effect restrain the action of the state, and would set aside the action of the state Legislature." (29 Fed. (2d) 824.)

volved." (*Ex parte Collins, supra,* 277 U. S. 565, 568.) In view of the fact that practically all industry within the State of New York has been compelled by the State Recovery Act to adjust and substantially modify its methods of operation, the determination of the validity of the statute is a matter of grave and general importance throughout the entire State. The question involved is indisputably one of the most important constitutional questions pending for decision by reason of its direct relationship to the National Recovery program. The constitutionality of the New York State Recovery Act which is either substantially similar to or identical with that of statutes adopted by twelve other States as well as the corollary proposition whether the specific Code rules and regulations adopted pursuant to it are in violation of the due process clause of the Federal Constitution, is one of the most important questions occupying and dominating contemporary thought and attention. The conclusion that the statute whose validity is herein attacked falls surely and definitely within the class of those indicated to be covered by Section 266 of the U. S. Code is inescapable.

It has already been pointed out that the Attorney General of this State has no function in the prosecution of crimes, except when specially required by the Governor or specifically designated in the Statute itself. If it is determined that the District Attorney of New York County is not an officer of the State, within the meaning of Section 266 of the Judicial Code, there will never be any occasion for invoking the jurisdiction of a three judge court in restraining the enforcement of a New York Statute, except when the statute itself imposes the duty of enforcement upon a state officer other than the regularly constituted prosecuting officials.

The duty of enforcement of State statutes has uniformly been placed in the hands of the District Attorney. Only in rare and unusual instances has the Attorney General or

any other State officer been specified in the statute as the enforcement agent.

The exercise of the power of special request on the part of the Governor has been made only upon extraordinary occasions. The cause has invariably been corruption, neglect of duty and the general breakdown in the performance of his functions by a specific District Attorney. Furthermore, the powers of the Attorney General are limited by Subdivision 2 of Section 62 of the Executive Law to attending a term of the *Supreme Court* or appearing before the grand jury thereof. The prosecution of misdemeanors cannot be instituted before the Supreme Court of the State,* which is the only Court in which the Governor is authorized to direct the Attorney General to appear in charge of criminal prosecutions. Obviously, therefore, the Attorney General can perform no function in the enforcement of this statute or any other statute when violation thereof constitutes only a misdemeanor.

Even were he joined as a party defendant with the District Attorney the jurisdiction of the Statutory Court could not for that reason attach because the Attorney General would be an unnecessary defendant against whom no relief could be granted. See: *Oklahoma Gas Company* v. *Packing Company, supra.*

Certainly the District Attorney, in the performance of his duties in the enforcement of State statutes and the prosecution for violations thereof, must be considered an officer of the State. Any other conclusion would operate to defeat the intent of Congress in enacting Section 266 and would frustrate the operation of that section in connection with a class of cases of the highest importance to New York State as a whole.

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* See Title III, Sec. 22, Code of Criminal Procedure of State of New York.

POINT II.

THE SUPPLEMENTAL RECORD.

The decree denying the preliminary injunction and dismissing the Bill of Complaint was entered October 18, 1934 (R. 273). The appeal was allowed by order entered November 13, 1934 (R. 274), and was docketed December 8, 1934 (R. 280). On February 1, 1935, a stipulation was entered into between the parties including the Attorney General of the State of New York (R. (S) 4) that the hearing on the application for a preliminary injunction and motion to dismiss should be deemed a final hearing on the merits, treating the affidavits and exhibits as the evidence upon such final hearing, and that the parties submit proposed findings of fact and conclusions of law to be entered by the lower Court *nunc pro tunc* as of October 15, 1934 (R. 2-3). That Court entered an order giving effect to this stipulation (R. 1-2). The findings of fact (R (S) 13-38) and conclusions of law (R (S) 38-43) contemplated by the stipulation and order were entered on February 16, 1935, *nunc pro tunc as* of October 15, 1934, a date preceding the date of the final decree, and the supplemental record was filed in this Court on February 23, 1935.

All of the proceedings shown by the supplemental record were taken by consent of the parties. In taking these steps the parties were seeking to avoid "the delays incident to futile appeals from interlocutory orders" (10 American Law Inst. Proceedings, 33-34). The hearing on the motion for preliminary injunction and the voluminous affidavits and exhibits submitted by both parties had developed the facts as fully as would have been possible upon a final hearing. The opinion of the lower Court had discussed fully all issues of substance raised in the suit and had decided the case on the merits. There was no reason to believe that the final hearing would develop any further facts or would cause any change in the opinion of the lower Court.

The parties therefore agreed, in order to present to this Court a record based upon adequate findings with no facts essential to the decision of this Court upon the application of the statute to the facts wanting, that the hearing already had should be deemed a final hearing on the merits and the lower Court should be requested to enter findings of fact and conclusions of law as upon a final hearing.

The amendment of Section 266 of the Judicial Code invites the procedure followed in the present case. Originally, Section 266 required the Statutory Court to hear and pass upon the application for a preliminary injunction only, and thereupon to refer the matter back to a single district judge for final hearing. In its amended form, however, the statute provides that the requirement respecting the presence of three judges shall also apply to the final hearing of such suit in the District Court. It is obvious that one of the chief purposes of the amendment was to eliminate the unnecessary and burdensome task of duplicating the presentation of evidence and holding a second hearing when there had already been resolved upon the first hearing all of the pertinent and essential facts at issue. In the majority of cases that seek to determine the validity of State statutes there are not presented any sharp issues of fact. The basic facts are not such as can be altered or modified by testimony whether written or oral. Usually, as here, the facts are matters of public record and not susceptible of dispute.

In the present case most of the findings of fact found by the Court below were agreed upon by the parties. As to the balance there can be no doubt that there was contained in the record clear and sufficient evidence for their support. The appellant nowhere in its brief attacked any of the findings of fact made as not being adequately supported by the evidence introduced, nor has it been suggested by anyone that upon a second hearing based upon oral testimony the Court below would have resolved the facts in any different fashion. Before the Statutory Court all parties

agreed upon the futility of a further hearing (R. (S) 2-3) and admitted its pointlessness insofar as accomplishing a modification of the findings that the Court below might make.

There is precedent for considering a hearing upon application for preliminary injunction and motion to dismiss as a final hearing and treating the affidavits and exhibits submitted as the evidence upon final hearing; *Hines' Trustees* v. *United States,* 263 U. S. 143. Such procedure unquestionably might have been taken in this case if the Court had remanded the case to the statutory court to permit the cause to proceed to final hearing and for findings of fact and conclusions of law as required by Equity Rule 70½ (*Bordens Farm Products Company* v. *Baldwin,* 293 U. S. 163). On such remand the parties could have entered into the same stipulation that they did and upon the entry of the findings of fact and conclusions of law, a new decree on final hearing might have been entered. From such decree a direct appeal would lie to this Court and that would present almost identically the same record as the present supplemental record. The procedure followed by the parties herein avoids the delay incident to a remand and a second appeal and accomplishes exactly the same result on the present appeal as would be accomplished by two appeals, had the parties waited until a remand of the case to take the steps that they did.

That the lower Court had reached a conclusion on the questions of fact presented by the evidence is clearly indicated by the detailed discussion of the facts contained in the Court's opinion (R. 265-273). To the extent, therefore, that the findings of fact represent omissions of findings appropriate to the interlocutory proceeding, their entry is a compliance with the rule laid down by this Court, *Public Service Commission* v. *Wisconsin Telephone Company,* 289 U. S. 67, 70, and supplies the findings which the Court below must have arrived at as the basis of its opinion.

While it has been held that a statement of facts after removal to the Appellate Court filed without consent of the parties and apparently without hearing must be ignored; (*Generes* v. *Bonnemer*, 7 Wall. 564, 565) this Court has permitted the filing of special findings of fact by a *nunc pro tunc* order after the expiration of the term at which the judgment was entered; *Insurance Company* v. *Boon*, 95 U. S. 117, 123-127. In the case last cited the Court makes a distinction between findings of fact and a bill of exceptions. With respect to the latter it has been held that the Court's power does not exist after the expiration of the term in which the judgment was rendered or the time as extended. See: *Jennings* v. *Philadelphia, Baltimore and Washington Railway Company*, 218 U. S. 255; *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293; *Exporters* v. *Butterworth Judson Company*, 258 U. S. 365.

There is no occasion for applying strict or technical rules governing the procedure before the Special Statutory Court which is a special creation of Congress for the purpose of hearing cases which are usually of substantial public importance. The rules of procedure are not express and should be implied in such manner as will permit prompt disposition upon the merits of these questions of public importance.

The findings of fact in the present case are unusually clear and complete. They are specifically founded upon voluminous evidence contained in the sworn proofs introduced before the Court below. They definitely and unqualifiedly satisfy the test made by this Court in *Borden* v. *Baldwin*, *supra*, where it was said:

> "• • • We held that before the questions of constitutional law both novel and of far reaching importance were passed upon by this Court 'the facts essential to their decision should be definitely found by the lower Courts upon adequate evidence.' "

Nothing further could be done to more appropriately or perfectly prepare this case for final disposition.

We submit that there is no rule or precedent that would require the Court to refuse recognition of the supplemental record. While the procedure may have been somewhat unusual, it was taken throughout with the full consent of all parties including the Attorney General of the State of New York upon whom notice was served as required by Section 266 of the Judicial Code; it was approved by the lower Court; it results in presenting to this Court a complete record upon which questions presented may be determined in the light of the application of the statute to the facts; and it avoids the delays incident to futile appeals from interlocutory orders. It accomplishes the result suggested as desirable by the Chief Justice in his address to the American Law Institute when he said:

> "In this highly important class of cases it is desirable that final hearings should be expedited and that the delays incident to futile appeals from interlocutory orders should be avoided." (10 Amer. Law Institute Proceedings 33-34. See also 47 Harvard Law Review 795, 820-821.)

The supplemental record should be considered as a part of the record on this appeal and the appeal should be treated as one from a final decree upon the merits, after final hearing.

POINT III.

IS THE PRESENT CASE WITHIN THE GENERAL EQUITY JURISDICTION OF THE FEDERAL COURT?

In the Court below appellee filed a motion to dismiss (R. 263-264) and raised the question as to jurisdiction of the Court to hear the bill of complaint. Appellee urged particularly that the bill of complaint and the relief sought were prohibited by section 265 of the Judicial Code (U. S. C. Title 28, Section 379), and that appellant had an adequate and complete remedy at law. These questions were fully

discussed at the hearing before the Statutory Court and upon briefs filed after the hearing.

The lower Court resolved these jurisdictional questions against the appellee without considering it necessary to discuss those points in its opinion. When the appeal was taken, appellee was desirous of facilitating a final decision upon the exceedingly important question of the validity of the Code provisions which he was enforcing by numerous proceedings in the County of New York, and concluded to accept the lower Court's views upon the jurisdictional questions. The appellee strongly felt a clear public duty to assist in the early determination of the constitutional questions presented by this case. The uncertainty that can only be resolved by the ultimate decision of this Court was and is seriously interfering with and gravely impairing the conduct and operation of industry in one of the largest commercial centers of the nation, New York County.

Therefore, by the stipulation agreeing to consider the hearing on the application for a preliminary injunction and motion to dismiss as a final hearing on the merits and to treat the affidavits and exhibits introduced upon such hearing as the evidence on final hearing, and by stipulating to the entry of findings of fact *nunc pro tunc*, appellee intended to waive the jurisdictional objections raised by its motion to dismiss. See: *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 484; *American Mills Company* v. *American Surety Company*, 260 U. S. 360, 363. Accordingly, appellee did not argue these questions upon the brief filed in this Court. Undoubtedly the Court may raise these jurisdictional questions upon its own motion, even though appellee might be barred from doing so by reason of this waiver.

It has frequently been stated that the general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. However, there have been many exceptions to this general rule. See: *Ex Parte Young*, 209 U. S. 123; *Truax* v. *Raich*, 239 U. S.

33, 37-39; *Packard* v. *Banton*, 264 U. S. 140, 143; *Terrace* v. *Thompson*, 263 U. S. 197, 214, and see also *Kennington* v. *Palmer*, 255 U. S. 100, 101, and cases referred to in footnote.

In *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500, this Court accepted the conclusion of the lower Court that the appellants were entitled to equitable relief if the statutes there under review were unconstitutional, basing such acceptance upon a liberal view of the decisions mentioned which included a number of those above cited.

It would be difficult to attempt a reconciliation of the cases which are held to be within the exception to the general rule and those to which the general rule is applied. Each case apparently turns upon the particular facts there found. In *Ex Parte Young, supra*, one of the earliest cases sustaining the exception to the general rule, the penalties for violation were not cumulative penalties, but were recurring penalties being separate penalties for the sale of each ticket above the rate allowed by the Act. In a number of other cases there were recurring penalties rather than cumulative penalties as the basis for equitable jurisdiction. In *Terrace* v. *Thompson, supra*, equity jurisdiction was sustained although the case involved only a single proposed transaction, namely, the lease of a parcel of land to an alien in violation of the Alien Land Law. There the Court held that the threat of the law enforcement officers prevented the owner and proposed lessee from dealing with one another and that they were not obliged to take the risk of prosecutions, fines and imprisonment and loss of property in order to secure an adjudication of their rights.

While the pleading leaves much to be desired and may perhaps require some favorable inferences to support it, a fair conclusion seems to be that the pleader intended to make allegations that would bring this case within the exception to the rule. Whether or not it succeeded in doing so by its pleading, the facts disclosed by the affidavits appear to support the case as a proper one for equitable jurisdiction and the findings of the Court below apparently

recognized and accepted appellant's evidence in this respect.

The Court below found that there was a threat of prosecution (R. (S) 15-16) and appellant was prevented by the Code under threat of penalties from conducting its business as it desired and as it would otherwise do (R. (S) 16); that the appellant had invested vast and considerable sums of money in the development of its business which had resulted in the establishment of a patronage of great monetary value (R. (S) 38); that the appellant is one of the largest motor vehicle retail dealers in the City of New York, operating four branches and employing eighty employees (R. (S) 13-14); and that the appellant had no adequate remedy at law and could have relief only in a Court of Equity (R. (S) 38). To all these findings appellee agreed.

Therefore, if the findings of fact contained in the Supplemental Record are given effect, appellee is hardly in a position to object now to the general equitable jurisdiction assumed by the Court below and the objections initially made by the motion to dismiss may be deemed to have been abandoned by the stipulation and agreement to these findings of fact.

Appellee is not in sympathy with that attitude of some prosecuting officials who seek to delay or avoid the test of a regulatory statute. Had appellee's motion to dismiss been sustained by the Court below on jurisdictional grounds the statute could have been tested by the criminal proceeding which appellee was ready to institute and that case would have been well on the way to final decision by the highest Court of the State of New York, or by this Court. But if the present proceeding is to be dismissed now for want of jurisdiction and the case begun anew in the State Court, final decision upon the validity of the State statute is likely to be postponed so long that the statute will expire by its terms before its validity is determined. For these reasons

appellee has been disposed to waive the jurisdictional questions presented by it in the Court below and does not press them now.

Respectfully submitted,

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Washington, D. C.,
March 28, 1935.

APPENDIX A.

EXCERPTS FROM CONSTITUTION AND STATUTES OF NEW YORK.

STATE CONSTITUTION (ADOPTED 1894).

Article V—Section 1.

The comptroller and attorney-general shall be chosen at a general election, at the times and places of electing the governor and lieutenant-governor, and shall hold office for the same term as the governor and lieutenant-governor.

Article X. Subdivision 1. Sheriffs, county clerks, district attorneys and registers; election, term, etc. Removal by governor.

Sheriffs, clerks of counties, district attorneys and registers in counties having registers, shall be chosen by the electors of the respective counties, once in every three years and as often as vacancies shall happen, except in the counties of New York and Kings, and in counties whose boundaries are the same as those of a city, where such officers shall be chosen by the electors once in every two or four years as the Legislature shall direct. Sheriffs shall hold no other office and be ineligible for the next term after the termination of their offices. They may be required by law to renew their security, from time to time; and in default of giving such new security, their offices shall be deemed vacant. But the county shall never be made responsible for the acts of the sheriff. The Governor may remove any officer, in this section mentioned, within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense.

STATE STATUTES.

PUBLIC OFFICERS LAW IN EFFECT AT TIME OF DECISION IN FELLOWS V. MAYOR (1876) AND PEOPLE V. NICOLL (1891).

CHAPTER V.

Of the Public Officers of this State, other than Militia and Town Officers; their election or appointment; their qualifications; and the tenure of their offices.

TITLE I.

Of the number, location and classification of the public Officers of the state.

Section 1. There shall be elected or appointed, in the manner hereinafter declared or prescribed, the following civil officers, who shall be arranged in classes to be denominated legislative, executive, judicial and administrative; but this classification shall not be construed as defining the legal powers of the officers, that shall be assigned to either class.

1. In the class of legislative officers.

* * * * * * * * *

2. In the class of Executive officers.

* * * * * * * * *

3. In the class of Judicial Officers.

* * * * * * * * *

A clerk, a sheriff, a surrogate and a district attorney for each county;

* * * * * * * * *

4. In the class of Administrative officers.

* * * * * * * * *

Sec. 15. The following officers, namely: sheriffs, clerks of counties, coroners, district attorneys, marshals of cities, the clerk of the court of oyer and terminer and general

sessions in New York, the register and clerk of that city, police justices and assistant justices in that city, and their clerks are so far local, as to require the residence of every person holding such office, within the county or city, in which the duties of his office are required by law to be executed.

Title II.

Of Legislative Officers.

* * * * * * * * *

Title III.

Of Executive Officers.

* * * * * * * * *

Title IV.

Of Judicial Officers.

Article First.

Of Judicial Officers Appointed by the Governor and Senate.

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Article Second.

Of Judicial Officers Appointed by Courts of Justice.

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Sec. 15. District attorneys are appointed by the judges of the County Courts of the respective counties. No person shall be appointed a district attorney, unless he be at the time a counsellor at law of the supreme court; but if there be no such counsellor residing in the county, or none willing to accept the office, an attorney at law may be appointed.

(Law of 1818, p. 306, sec. 4; 1824, p. 314, sec. 2).

* * * * * * * * *

Sec. 68. Sheriffs, clerks of counties, including the register and clerk of the city and county of New York, coroners, and district attorneys, shall be chosen by the electors of the respective counties, once in every three years and as often as vacancies shall happen. Sheriffs shall hold no other office, etc. * * *

EXECUTIVE LAW.

(Laws of 1909, Chapter 23)

Section 62. *General duties.* The attorney-general shall:

Subdivision 1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state, but this section shall not apply to any of the military department bureaus or military offices of the state.

Subdivision 2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury such criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending. In all such cases all expenses incurred by the attorney-general, includ-

ing the salary or other compensation of all deputies employed, shall be a county charge.

Section 62.—General duties (as amended by L. 1921, Ch. 592 and L. 1927, Ch. 8, sec. 3).

3. Upon the request of the governor, secretary of state, comptroller, superintendent of public works or commissioner of taxation and finance, prosecute every person charged by either of them with the commission of an indictable offense in violation of the laws, which such officer is specially required to execute, or in relation to matters connected with his department (as amended by Laws 1921, Ch. 592 and Laws 1927, Ch. 8, section 3).

PRESENT PUBLIC OFFICERS LAW.

Chapter 47 of the Consolidated Laws.

(Laws of 1909, Chapter 51)

ARTICLE I. Short Title; *Definitions.*

* * *

Section 2.—Definitions.—The term "state officer" includes every officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political sub-division of the state, except United States senators, members of Congress, and electors for president and vice president of the United States. The term "local officer" includes every other officer who is elected by the electors of a portion only of the state, every officer of a political subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state. The office of a state officer is a state office. The office of a local officer is a local office.

Sec. 3. *Qualifications for holding office.* No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, be of full age, a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen, or within which the electors electing him reside, or within which his official functions are required to be exercised.

* * * * * * * * *

LAWS PRIOR TO 1909 PRESCRIBING DUTIES OF DISTRICT ATTORNEYS.

(Laws of 1818, Chapter 283.)

It shall be the duty of the several district attorneys to attend the courts of Oyer and Terminer and Jail Delivery and General Sessions of the Peace to be from time to time, held within the Counties for which they are or shall be appointed respectively and to conduct all prosecutions for crimes and offenses cognizable in the said Courts.

(Note: The foregoing provision was continued in force in substantially the same form (Edmonds Statutes, 1869, p. 355; Banks & Brothers 7th Edition, 1882, p. 970) to and including Section 89 of Chapter XII of the Revised Statutes. (Banks & Brothers, 8th Edition, 1889, p. 1066, which is shown below.)

Section 89. It shall be the duty of every district attorney to attend the Courts of Oyer and Terminer and Jail Delivery and General Sessions, to be held from time to time in the County for which he shall have been appointed, and to conduct all prosecutions for crimes and offenses cognizable in such Courts.

(Note: The foregoing provision was repealed by the County Law of 1892 which was superseded by the present County Law, Chapter 16 of Laws of 1909.)

COUNTY LAW.

(Laws of 1909, Chapter 16.)

Section 2.—Application of this chapter. This chapter shall not apply to the county of New York, except as hereinafter specifically provided, and except that provisions of the code of civil procedure in force on April 14th, 1921, applicable to the county of New York and substantially reenacted into this chapter as a result of the revision of the code of civil procedure in the year 1920 shall continue to apply to such county.

* * * * * * * * * *

Section 200. Election, appointment, term of office and undertaking of district attorney.

There shall continue,

1. To be elected in each of the counties, a district attorney who shall hold his office for three years from and including the first day of January succeeding his election;

2. To be appointed by the governor, a district attorney, when a vacancy shall occur in such office, and the person so appointed shall hold the office until and including the last day of December succeeding the first annual election thereafter at which such vacancy can be lawfully filled.

* * * * * * * * * *

4. It shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the Courts of the County for which he shall have been elected or appointed; except when the place of trial of an indictment is changed from one county to another, it shall be the duty of the district attorney of the county where the indictment is found to conduct the trial of the indictment so removed, and it shall be the duty of the district attorney of the county to which such trial is changed to assist in such trial upon the request of the district attorney of the county where the indictment was found.

(Note—By reason of the provision of Section 2 expressly excepting the County of New York from the application of the county law, the provision of sub-division (4) of Section 200 prescribing the general duties of the District Attorney does not apply to the District Attorney of New York County. There appears to be no other statute prescribing in general terms the duties of the District Attorney of New York County. However, other statutes of general application make it clear that the District Attorney of New York County is the prosecuting officer for that County and that all crimes triable in the courts within the County of New York must be prosecuted by him. See the sections of the Code of Criminal Procedure shown below.)

CODE OF CRIMINAL PROCEDURE.

Section 222. Crimes; how prosecuted. All crimes prosecuted in a supreme court, or in a county court, or in a city court, must be prosecuted by indictment. But, where a defendant has been held to answer to any of these courts, that court, or any of said courts to which he might have been held to answer, may, on the application in writing of the defendant, direct any information to be filed against him for the offense for which he stands charged.

The information shall be filed and signed by the district attorney of the county wherein the action was begun, and may be substantially in the following from: • • •

Section 276. Form of indictment. The indictment shall be signed by the district attorney, and may be substantially in the following form: • • •

Section 742. Trial by and form of information. All criminal actions in the courts of special sessions in the city of New York must be prosecuted by information made by the district attorney, on returns filed pursuant to section two hundred and twenty-one, or information filed by the district attorney in a misdemeanor case by direction of a

grand jury approved, upon order, by the court for which the grand jury was drawn. The information shall be signed by the district attorney of the county wherein the action was begun and may be substantially in the following form: • • •

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 567

SPIELMAN MOTOR SALES CO., INC.,

Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,

Defendant-Appellee.

MEMORANDUM ON JURISDICTION

and

MOTION TO DISMISS

JOHN J. BENNETT, JR.,
Attorney-General.

HENRY EPSTEIN,
Solicitor General,
For the State of New York.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 567

SPIELMAN MOTOR SALES CO. INC.
Complainant-Appellant,

against

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,
Defendant-Appellee.

MEMORANDUM ON JURISDICTION UNDER SECTION 266 OF JUDICIAL CODE AND MOTION TO DISMISS

Now comes the State of New York by its Attorney General, John J. Bennett, Jr., and moves to dismiss the appeal of the appellant, Spielman Motor Sales Co. Inc., on the ground that under § 266 of the Judicial Code (§ 380, Title 28, United States Code) no jurisdiction was had by the three judge court below to enjoin the prosecution of a criminal offense resulting from a violation of a State statute by the District Attorney of New York County, appellee, and further for the reason that an adequate judicial process and remedy existed at law in the State courts affording to the appellant the opportunity for testing the constitutional

validity of the State statute in question (Chapter 781, Laws of 1933) under the State and Federal constitutions without undue delay or hardship.

Which foregoing relief the undersigned prays.

Yours etc.
JOHN J. BENNETT, JR.
Attorney General

HENRY EPSTEIN
Solicitor General
For the State of New York.

STATEMENT

Upon the argument of the within appeal before this court on March 11, 1935, the Honorable Chief Justice raised the question of jurisdiction under § 266 of the Judicial Code. In view of the fact that counsel had not briefed the question (a motion to dismiss on the ground of adequate remedy in the State courts having been denied by the three judge court below), this court has requested briefs upon the jurisdictional issue.

The jurisdictional question upon which the Honorable Chief Justice has indicated a desire to have memoranda involves the following:

1. Whether or not the District Attorney of New York County is a State officer or an "officer of the State" within the meaning of §266 of the Judicial Code;

2. Whether an adequate remedy at law existed in the State courts so that there was no extraordinary necessity for the exercise of the equity jurisdiction of the three judge court.

The following discussion is submitted on behalf of the State of New York by the Attorney-General in

support of the position taken by the State of New York, that jurisdiction should not have been assumed by the statutory court, and the appeal should not be received by this Honorable Court.*

PROCEEDINGS BELOW

Before the three judge court, which was convened pursuant to the provisions of the Judicial Code, § 266, the Attorney-General, appearing on behalf of the State of New York, moved with the district attorney to dismiss on the ground that an adequate remedy existed in the State courts to test the validity of the State statute under the State and Federal constitutions. Some doubt existed (Record, p. 264) in the statutory court as to the position of the Attorney-General or the State as a party. Since a State statute is attacked primarily under the State Constitution, the Attorney-General thought it advisable to appear and submit briefs on behalf of the State in support of the constitutionality of the State act. The motion to dismiss for jurisdictional defects was denied by the statutory court.

The proceeding, the restraint of which is sought in the complaint of appellant, was merely a preliminary "investigation" commenced in the Magistrate's Court of the City of New York (the equivalent of a local Police Court), to ascertain whether there had been committed a criminal offense in the nature of a violation of Chapter 781 of the Laws of 1933, known as the State Recovery Act. As a result of this inquiry it might or might not have been determined that the

* Upon the express recommendation of the Governor, an amended State Recovery Act has been introduced into the State legislative session now sitting (March 27, 1935). If enacted, the within attack upon Chapter 781, Laws of 1933, may well become academic. There are substantial changes made in procedure and substance. Copy of the proposed act is annexed hereto.—(Appendix A.)

appellant was guilty of such violation. (R., p. 12.) It was made clear upon the argument below that until the State's highest court had determined the issue raised upon such prosecution, no repeated or continued prosecutions would be undertaken, so that there was present no possibility of nuisance or irreparable damage in the form of such multiplicity of prosecution.

Counsel for complainant, however, insisted upon the need and propriety of the three judge procedure; was unwilling to submit to the proceedings in the Magistrate's Court. Had complainant done so and had a conviction resulted, the issue could squarely have been raised on a writ of habeas corpus or by appeal, testing the validity of the State act sought to be enforced.

The court below heard full argument and determined the issue as if it had been properly before it. In view of the doubt existing as to the propriety of the State being a party in the form taken by the action herein, the Attorney-General on the argument below and in his brief heretofore submitted on the present appeal, requested permission to file a brief and be heard upon the constitutional issue presented.

The State of New York takes the position that there existed no jurisdiction in the Statutory Court in the instant appeal; that no "officer of the *State*," within the meaning of § 266 of the Judicial Code, was sought to be restrained; that there were no extraordinary circumstances warranting the determination of the issue involving a State statute by a three judge court; that the alleged invalidity of the act under the Federal Constitution is merely incidental to the chief attack upon its validity under the State Constitution, and that for the foregoing reasons the appeal should be dismissed for want of jurisdiction. The motion heretofore made (R., p. 264) and submitted herewith is to the said effect and the sub-joined memorandum is in support thereof.

I.

The three judge court under the Judicial Code, § 266 (U. S. Code, Title 28, § 380), should not have assumed jurisdiction to enjoin the pending prosecution by the District Attorney of New York County for an alleged violation of a State statute on the ground of the alleged invalidity of the said statute under the State and Federal Constitutions when no extraordinary circumstances were present warranting such jurisdiction.

(a) The Jurisdiction of the Three Judge Court.

The Statutory Court of three judges authorized by § 266 of the Judicial Code is intended to expedite the determination of serious questions of constitutionality of State statutes under the Federal Constitution and to remove from the power of a single District Judge the authority by injunction to forbid the enforcement of State laws. It was intended to be operative when aimed at the action of an "officer of the State." The fact that the statute was general in its application does not authorize jurisdiction if the officer be not an "officer of the State."

Ex Parte Public Bank, 278 U. S. 101,

In the cited case Mr. Justice Sutherland pointed out the two concurrent requisites to such jurisdiction.

> "(1) The suit must seek to have a State statute declared unconstitutional, or that in effect, and
> "(2) It must seek to restrain the action of an officer of the State in the enforcement of such statute." (P. 104.)

The said case involved the collection of taxes fixed pursuant to State law. A mandamus to compel the calling of a three judge court was denied, there being lacking the second requisite, even though the statute

itself was general and the levy collected pursuant to the mandate of a State law.*

In the instant appeal the chief attack is made upon the State statute on the ground that the alleged violation thereof will deprive the appellant of liberty and property without due process of law under the State Constitution, and that the said State statute is violative of other provisions of the State Constitution. It is further attacked upon the ground that it likewise violates the Fifth and Fourteenth Amendments to the Federal Constitution. The attack upon the State statute under the Federal Constitution is secondary and incidental to the attack under the State Constitution. Since the due process clause of the New York State Constitution (Art. I, § 6) is in effect the same in application as the due process clause of the Federal Constitution, the issue would be determined as readily in the State courts as in the Federal courts.

The attack upon the National Industrial Recovery Act, as the basis upon which the State act was enacted, is incidental and it is respectfully submitted that no such indirect method should be permitted as an avenue of approach to the three judge court under § 266 of the Judicial Code.

In *Stratton, Secretary of State of Illinois*, v. *St. Louis S. W. Ry.*, 282 U. S. 10 the jurisdictional question was raised. This court reversed and remanded for want of jurisdiction.

* A thorough discussion of the jurisdiction of the three judge court under § 266 of the Judicial Code is found in 47 Harvard Law Review, 795—"A case for Three Judges," J. C. Hutcheson, Jr. "Congress had shown an intent to recognize a suit in the State court to enforce the law as a more appropriate proceeding to settle the validity of the State statutes than a suit in the Federal court to enjoin its enforcement." (47 Harvard L. Rev., p. 824.)

General Outdoor Advertising v. *Williams*, 9 Fed. (2nd) 165 —Reversed 12 Fed. (2nd) 773.

> "The statute applies only where there is a substantial claim of invalidity under the Federal Constitution and where an application for an interlocutory injunction, for the purposes contemplated by the statute, is made and pressed. *Ex parte Buder*, 271 U. S. 461, 463, 467; *Ex parte Hobbs*, 280 U. S. 168, 172."

In *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S 386, this court held (p 391):

> "The three judge procedure is an extraordinary one imposing a heavy burden on federal courts with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended."

Mr. Justice Stone there pointed out that it should be invoked only if the suit is to restrain the action of "State officers."

(b) The District Attorney of New York County Should Not Be Regarded as a State Officer in the Sense That That Term Is Used in § 266 of the Judicial Code.

Historically District Attorneys in New York State have performed State functions in respect of the prosecution of criminal offenses. For over a century, however, they have been independent of the State's Attorney-General, the head of the Law Department of the State government. Their duties in the prosecution of criminal offenses, while nominally a State function, do not bring them within the definition of a "State officer" with general jurisdiction in the State. *They are officers with jurisdiction confined to a county; they are elected by the voters of a county; compensa-*

tion fixed by the county authorities and paid by the county. The Attorney-General of the State is not authorized to prosecute offenses generally and has no such jurisdiction under Chapter 781 of the Laws of 1933, the statute here in question.

The State Public Officers Law, § 2, defines State officers and local officers and by this definition the District Attorney clearly does not come within the scope of the language "an officer of the State" or "State officer."*

The proper procedure for plaintiff herein was an action to enjoin the Secretary of State as the filing or administrative officer under the statute here attacked. (Ch. 781, L. 1933, § 2.) In such case a proper "State officer" would have been the defendant and an administrative act would have been the procedure attacked. Thereby the validity of the statute might in its inception have been determined. A three judge court might then have convened.

In the present case, however, there has been sought a method, which, if adopted and general in application, may completely destroy the effectiveness of prompt prosecutions of criminal acts under State statutes for violations thereof. This would indeed be a readily adaptable mode of attack upon a State statute via the Federal courts.

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* § 2. *Definitions.* The term "State officer" includes every officer for whom all the electors of the State are entitled to vote, members of the Legislature, justices of the Supreme Court, regents of the university, and every officer, appointed by one or more State officers, or by the Legislature, and authorized to exercise his official functions throughout the entire State, or without limitation to any political subdivision of the State, except United States Senators, members of Congress, and electors for President and Vice-President of the United States. The term "local officer" includes every other officer who is elected by the electors of a portion only of the State, every officer of a political subdivision or municipal corporation of the State, and every officer limited in the execution of his official functions to a portion only of the State. The office of a State officer is a State office. The office of a local officer is a local office.. (Public Officers Law of N. Y. State, Section 2 complete.)

Although in some earlier cases jurisdiction was assumed upon direct appeal in instances involving prosecuting officers (*Noble* v. *Douglas*, 261 U. S. 165; *Gulf Fisheries Co.* v. *MacInerney*, 276 U. S. 124; *Fenner* v. *Boykin*, 271 U. S. 241), nevertheless in the instant case the language of Mr. Justice McReynolds in *Fenner* v. *Boykin* is persuasive that jurisdiction should be declined:

> "The accused should first set up and rely upon his defense in the State courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise, if, whenever about to be charged with violating a State law, one were permitted freely to contest its validity by an original proceeding in some federal court. (*Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500. 45 S. Ct. 141, 69 L. Ed. 402.)"

Mr. Justice McReynolds further pointed out that there should be no interference with said prosecutions unless "absolutely necessary for the protection of constitutional rights."

It should be noted that in *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (affirming a three judge court as to threatened prosecutions) the pending prosecution was not restrained and there was a reversal as to that action. The court indicated that it was necessary to evidence irreparable damage and multiplicity of actions and that the court would be loath to restrain a single criminal prosecution under a State statute although it might restrain continued prosecution pend-

ing the determination of the validity of the statute attacked.

None of these factors is present in the instant appeal. No prosecution had been commenced; a preliminary investigation was about to be set in motion and there was no threat to continue prosecutions, pending the determination of the validity of the one prosecution if undertaken following such preliminary investigation.

The restraint sought in the within action before the three judge court was premature. The remedy in the State courts to test the validity of the statute following a prosecution for violation thereof was expeditious and adequate. That orderly method of procedure should not be jeopardized through the process of the three judge court. This court should mark very strictly the limits of the restraints to be placed upon local prosecuting officers in matters of alleged violations of State statutes. Criminal prosecutions should be as free from restraints as possible; particularly so, where the method of testing the validity of the State statute by a proceeding against an administrative State official could have been had. (In this case, the Secretary of State.)

Triangle Mint Corporation v. *Mulrooney*, 257 N. Y. 200.

"An equity court should exercise its jurisdiction to restrain the police power from enforcing a criminal statute, the enforcement of which threatens property damage, only in cases where a clear legal right to that relief is established." (P. 201.)

No such situation is presented in the present case and if the alleged damage could have been shown to be impending the State courts would likewise have been available to restrain such threatened irreparable damage.

The position of the Attorney-General under the Executive Law of New York State, § 62, does not create a District Attorney a State officer.*

By such section the Attorney General is permitted, upon designation of the Governor, to supersede a District Attorney in respect of any criminal prosecution pending. Unless, however, and until this action is taken, it cannot be said that the District Attorney is a State officer by reason of the possible relationship which may on occasion be created. It is submitted that the provisions of § 266 of the Judicial Code refer to a State officer in the sense of one who has general State duties to perform and is not restricted to a particular geographic subdivision of the State in his functions.

---

* "§ 62. *General duties.* The attorney-general shall: 1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state, but this section shall not apply to any of the military department bureaus or military offices of the state.

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury such criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending. In all such cases all expenses incurred by the attorney-general, including the salary or other compensation of all deputies employed, shall be a county charge. . . ."

(C) The Appearance of the Attorney-General and the Service upon the Governor and the Attorney-General in the Action Do Not Bring This Case Within the Scope of § 266 of the Judicial Code.

The Attorney-General may appear and is required in certain circumstances to appear in defense of the validity of State statutes whose constitutionality is attacked. (§ 68, Executive Law, New York State.)*

The appearance of the Attorney-General in the action before the court below was pursuant to service upon him and upon the Governor. This appearance and his participation thus far are in accordance with the policy and established practice of the Attorney-General's office in cases where the constitutional validity of State statutes is attacked. It does not amount to any concession of participation by the State as such in the proceeding, nor should it be regarded in and of itself as sufficient to warrant the assumption of jurisdiction by the statutory three judge court.

---

* § 68. *Attorney-general to appear in cases involving the constitutionality of an act of the Legislature.* Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute. (Executive Law of N. Y. State, Section 68 complete.)

CONCLUSION

For the foregoing reasons, it is respectfully urged that the instant appeal be dismissed for want of jurisdiction.

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York

HENRY EPSTEIN,
Solicitor-General,
Of Counsel,

Office and Postoffice,
The Capitol,
Albany, N. Y.

APPENDIX "A"

STATE OF NEW YORK

No. 2412 **Int. 1966**

IN SENATE

March 27, 1935

AN ACT

To amend chapter seven hundred and eighty-one of the laws of nineteen hundred thirty-three, entitled "An act to provide for codes of fair competition for trades, industries and subdivisions thereof, agreements, licenses, rules and regulations pursuant to the provisions of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state," generally, and repealing section six thereof, relating to licenses

Section 1. The title and sections one, two, three, five, seven and eight of chapter seven hundred and eighty-one of the laws of nineteen hundred thirty-three, entitled "An act to provide for codes of fair competition for trades, industries and subdivisions thereof, agreements, licenses, rules and regulations pursuant to the provisions of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state," are hereby amended to read, respectively, as follows:

An act to provide for codes of fair competition for trades, industries and subdivisions thereof, agreements, [licenses] *orders,* rules and regulations pursuant to the provisions of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted. This statute is pending at the date of this writing, April 1, 1935.

Section 1. Legislative finding; statement of policy. A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the state of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the state of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York. *The legislature hereby reaffirms and redeclares the foregoing statements of facts, findings and policies and hereby further finds and it is hereby further declared to be the purposes of this act, and the policies of this state, to supplement and to cooperate in effectuating national*

policy, to meet the emergency, to insure uniformity of state regulation of commerce with national regulation, to remove obstructions to the free flow of commerce which tend to diminish the amount thereof, and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, by inducing and maintaining cooperation of labor and management under adequate governmental sanctions and supervision, by eliminating unfair competitive practices, by promoting the fullest possible utilization of the present productive capacity of industries, by increasing the consumption of industrial and agricultural products, by increasing purchasing power, by reducing and relieving unemployment, by improving standards of labor, and otherwise rehabilitating industry and conserving natural resources.

§ 2. Filing of codes and agreements. 1. The secretary of state is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each code *of fair competition*, agreement, [license] *order*, rule or regulation in effect pursuant to [such act of the Congress] *title one of the national industrial recovery act, and any act amendatory thereof*, pertaining, affecting or in any way relating to the conduct of business in the state and duly certified as a true copy of such document or documents by the officials in charge of the administration of the provisions of title one of the said national industrial recovery act, *and any act amendatory thereof*, or by their duly authorized agents. *For the purposes of this section the imprint of the United States government printing office, Washington, District of Columbia, shall be equivalent to certification.* Upon such filing of a copy so certified *or imprinted* of a code of fair

competition for any trade, industry or subdivision thereof, as approved by the president of the United States, or of any agreement, [or license] *order,* [or of any] rule or regulation provided for under title one of the said national industrial recovery act, *and any act amendatory thereof,* such code, agreement, [license] *order,* rule or regulation shall by *virtue of this act* be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, *provided, however, that the following standards, requirements and conditions shall have been complied with in the promulgation of any such code of fair competition and/or agreement:*

(a) That such code of fair competition shall have been submitted by one or more trade or industrial associations or groups which impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof.

(b) That such code of fair competition or agreement shall have been found not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them and will tend to effectuate the policies set forth in section one of this act.

(c) That such code of fair competition or agreement shall contain a provision that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment prescribed in any such code of fair competition or agreement.

The conformity of any code of fair competition or agreement with the standards, requirements and conditions contained in paragraphs (a) (b) and (c) of this section, shall be a prerequisite to the filing of such code of fair competition or agreement with

the secretary of state; provided, however, that every code of fair competition or agreement in effect pursuant to such or any act amendatory thereof shall be presumed to comply with the foregoing standards, requirements and conditions, and any findings made or entered by the president, or his duly constituted agent or agents therefor, pursuant to such act or any act amendatory thereof shall be deemed prima facie proof of conformity with such standards, requirements and conditions, and shall be the authority to the secretary of state for the filing of such code of fair competition or agreement, unless the secretary of state shall within fifteen days of the filing thereof, except as to such codes or agreements as have heretofore been filed, in which case, within fifteen days from the date this section, as hereby amended, takes effect, make a specific finding that such code or agreement does not conform with such standards, requirements and conditions or does not tend to effectuate the policies of this act, in which case such code or agreement shall not become effective or shall thereafter have no force or effect hereunder. [and any] *Any* violation of any provision of such code *of fair competition*, agreement, [license] *order*, rule or regulation shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense, and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.

2. The secretary of state shall cause to be printed *or purchased from the United States government printing office* a sufficient number of copies of each such code, agreement, [license] *order*, rule or regulation and the same shall be kept available for distribution upon request therefor

3. If in any such code, agreement, [license] *order*, rule or regulation, power is conferred upon any person or group of persons to subpoena witnesses, compel the production of books, papers and records, the attendance of witnesses or to take their testimony, a like power shall be deemed to have vested in such person or group of persons with regard to matters and things of a wholly intrastate character.

§ 3. Jurisdiction of court. The supreme court of the state of New York is hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition, agreement, [license] *order*, rule or regulation, filed pursuant to this act, and to prevent and restrain the commission within this state of any act tending to defeat or hamper the operation and effectiveness, within the state, of such act of the congress at the instance of any party whose interests are or may be adversely affected by such violation or acts *or at the instance of any code authority, or any officer thereof duly appointed or elected under the provisions of any such code, agreement, order, rule or regulation to administer any such code of fair competition or agreement which has been so violated.* Nothing in this section contained, however, shall in any wise affect the criminal liability for violations of such codes, agreements, [licenses] *orders*, rules or regulations. Provided, however, that nothing in this act shall be construed by any public official or court as declaring illegal the right of workers to organize; to adopt a constitution and by-laws and enforce the same and the right to control and direct the members of such organization in accordance with such constitution and by-laws; that no provision of this act shall be construed to compel workers or employees to continue at their work; or to declare an act illegal of an organization to collectively cease work,

or its officers directing the cessation of work of its members.

§ 5. Exemption from anti-trust laws; application of labor laws. While this act is in effect and for sixty days thereafter, any code *of fair competition,* agreement, [license] *order,* rule or regulation in effect under this act, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of article twenty-two of the general business law, or of any other provisions of law, to the extent that such provisions of law are inconsistent with the provisions of such code, agreement, [license] *order,* rule or regulation. Nothing in this act contained, however, shall be construed in any way to alter, modify or affect the provisions of existing laws of this state in such manner as to permit any change in public utility rates except with the permission and approval of the public service commission or [as] to lower the standards therein provided with regard to labor, hours of labor, wages for labor and employment of females and children.

§ 7. Letting of public contracts. [Every] *No* department, board, bureau, agency, authority, commission, public body or officer of the state or of any political subdivision thereof or district therein charged with the duty of letting or awarding contracts for (a) the construction, alteration or repair of public works or (b) the purchasing of materials or supplies, shall, notwithstanding any inconsistent provision of law, let or award such contracts, *unless invitations to bidders shall contain a provision to the effect that no bid shall be considered unless it is accompanied by a certificate, duly executed by the bidder, stating that the bidder is complying with and will continue to comply with each approved code of fair competition or agreement to which he is subject; and*

every such contract and purchase order shall contain a provision to the effect that the party awarded any such contract or purchase order shall comply with each code of fair competition or agreement to which he is subject; and provided further, all such contracts or purchase orders shall contain a provision to the effect that such party, in the fulfillment of such contract or purchase order, shall not accept or purchase for the performance of such contract or purchase order, or enter into any sub-contracts for any articles, materials, services or supplies, in whole or part purchased or furnished by any person who has not certified to such party that he is complying with and will continue to comply with each code of fair competition or agreement which relates to such articles, materials, services and supplies; and further, all such contracts shall contain a clause or provision that the department, board, bureau, agency, authority, commission, public body or officer of the state, or of any political subdivision thereof or district therein charged with the duty of letting or awarding such contracts shall have the right to cancel the contract for failure to comply with such codes or agreements as aforesaid [only to such persons or corporations, otherwise qualified, who or which will agree in and by the terms of such contract to use or supply only articles, materials and supplies which have been or will be mined, produced, manufactured or supplied, as the case may be, by a person or corporation who or which is a party or subject to a code of fair competition, agreement or license, approved, prescribed or issued under the said national industrial recovery act for the trade, industry or subdivision thereof mining, producing, manufacturing or supplying such articles, materials or supplies].

§ 8. Duration. This act, in so far as it affects agreements, codes, *orders*, rules or regulations, shall become ineffective contemporaneously with the expiration of said national industrial recovery act[, provided for by section two (c) of said act, and in so far as it affects licenses, contemporaneously with the expiration of the said national industrial recovery act, as provided for in section four (b) of said act]* or any act amendatory thereof.*

§ 2. Section six of such chapter is hereby repealed and such chapter is hereby amended by inserting therein a new section, to be section six, to read as follows:

§ 6. Action by employees for non-payment of wages. Any employer subject to the provisions of any such code of fair competition or agreement who pays an employee wages at a rate below the minimum provided for therein shall be liable to pay and shall pay to any such employee the difference between the wages actually received by such employee and those to which such employee would have been entitled, if paid at the minimum rate provided for by such code or agreement, and such employee may bring an action to recover such sum in any court of competent jurisdiction.

§ 3. This act shall take effect immediately.

SUPREME COURT OF THE UNITED STATES.

No. 567.—October Term, 1934.

Spielman Motor Sales Co., Inc., Appellants, *vs.* William C. Dodge, as District Attorney of New York County, State of New York.	Appeal from the District Court of the United States for the Southern District of New York.

[April 29, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Appellant, a retail dealer in automobiles in the City of New York, brought this suit to restrain the District Attorney of New York County from instituting a criminal prosecution for alleged violation of the "Code of Fair Competition for the Motor Vehicle Retailing Trade". Appellant alleged that he was threatened with prosecution under Chapter 781 of the Laws of 1933 of the State of New York, which made it a misdemeanor to violate any provision of a code of fair competition as approved by the President of the United States under Title I of the National Industrial Recovery Act. 48 Stat. 195. It appears that the charge of violation of the code related to the provisions which limited the amount to be allowed for an old car "traded in" as part payment for a new car and required the maintenance of factory list prices, plus certain charges, with a prohibition against discounts, gratuities, etc. for the purpose of inducing purchases. The state statute was challenged as repugnant to the Constitution of the State, by reason of an improper delegation of legislative power, and also as effecting a deprivation of liberty and property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

Appellant's application for an interlocutory injunction was heard in the District Court by three judges. Jud. Code, sec. 266, 28 U. S. C. 380. There was also a motion by the defendant to dismiss the bill of complaint upon the grounds, among others, that it failed to allege facts constituting an equitable cause of action, and

that the District Court was without jurisdiction. Pursuant to notice, the Attorney General of the State appeared in support of the state act. Affidavits were submitted on both sides and, on hearing, the District Court sustained the validity of the statute and, on that ground, denied the motion for injunction and granted the motion to dismiss the bill. An order to that effect was entered and the case comes here on appeal.

Upon the argument at this bar, the questions were raised (1) whether the District Attorney was an officer of the State within the meaning of section 266 of the Judicial Code, and (2) whether the complaint stated a cause of action within the equitable jurisdiction of the District Court. The case was continued to permit the parties to file briefs upon these questions, and the briefs are now in.

First. If the District Attorney of the County of New York, is to be deemed a local officer, performing a local function in a matter of interest only to the particular county, section 266 of the Judicial Code has no application and we are without jurisdiction of this direct appeal from the District Court. *Ex parte Collins*, 277 U. S. 565, 568; *Ex parte Public National Bank*, 278 U. S. 101, 104; *School District 104* v. *Hunnicut, County Superintendent*, 283 U. S. 810. See, also, *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 390.

The office of district attorney in the State of New York was created in 1801. In each of the districts as then established, which included several counties, he was charged with duties which previously had devolved upon an assistant attorney general. In 1815 the County of New York was made a separate district, and in 1818 provision was made for the appointment of a district attorney in each county. The power of appointment was vested in the Governor and the Council of Appointment until the constitution of 1821, when that power was given to the county courts. The constitution of 1846 provided that district attorneys should be chosen by the electors of the respective counties.

Despite this provision for local elections, the district attorney in each county has been regarded as a state officer performing a state function and taking the place, in respect to his duties within the district or county, of the attorney general, upon whom at the outset these duties had been laid. Lincoln's Constitutional History of New York, Vol. 2, pp. 529, 530; vol. 4, pp. 722, 723. Under

the state statutes prior to 1892; it appears that district attorneys were classified as judicial officers. N. Y. Rev. Stat., Chap. V, Title I. In *Fellows* v. *Mayor* (1876), 8 Hun 484, 485, dealing with the status of an assistant district attorney, the court said: "It is conceded that the district attorney is a State officer. It could not well be questioned". And in *People ex rel. Lyon v. Nicoll* (1891), 32 N. Y. S. 279, 280, the court referred to the office of the district attorney as "a state office, classified by the Revised Statutes as a judicial office".

In the Public Officers Law of 1892 (now Chapter 47 of the Consolidated Laws of New York, Article I, section 2) a different classification was made and public officials were defined as either "state officers" or "local officers", the latter embracing officers chosen "by the electors of a portion only of the State." District attorneys fall within this description of local officers. Notwithstanding the change in classification, they are still to be deemed a part of the judicial system of the State, each performing within his county a distinctively state function. Lincoln's Constitutional History of New York, *loc. cit.* See Opinions, Attorney General of New York, 1924, p. 120.

In this view we cannot regard the local description, or the method of selecting the officer, as decisive with respect to the application of section 266 of the Judicial Code. That section relates to suits in which an interlocutory injunction is sought to restrain, on constitutional grounds, the enforcement "of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statntes of such State". To determine the application of this provision, we must have regard both to the nature of the legislative action which is assailed and to the function of the officer who is sought to be restrained. We have said that the reference is not to every legislative action, regardless of its nature and scope, but to a statute "of general application" or an order of a state board or commission. Thus, the section does not apply to suits to restrain the enforcement of municipal ordinances or the orders of a city board. *Ex parte Collins, supra.* And, although the constitutionality of a statute is challenged, the provision is inapplicable where the defendants are local officers and the suit "involves matters of interest only to

the particular municipality or district." *Id.* Accordingly, a suit against local officials to enjoin the collection of taxes assessed against shares in a national banking association, in pursuance of a state law but "by, and for the sole use of, the city", was found not to be within the section. *Ex parte Public National Bank, supra.* We pointed out that the suit must not only seek to have a state statute declared unconstitutional, or that in effect, but to restrain the action "of an officer of the state". But the Court was careful to reserve the question whether so-called local officers might not in fact represent the State or exercise "state functions in the matters involved", so as to bring the suit to restrain their action within the provision for three judges and direct appeal. *Id.*, p. 105.

Where a statute embodies a policy of statewide concern, an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the State and not simply in the interest of the locality where he serves. This is especially true in the case of a prosecuting officer who acts for the entire State, as a part of its machinery of enforcement, in proceedings against violators of the state statute. The function of such an officer, in enforcing a statute of general application, is of controlling importance in giving effect to the intent of the Congress.

In the instant case it is manifest that the statute under attack attempted to establish a statewide policy, and not one merely in the interest of the particular county. The defendant is charged with the duty of enforcing the statute by prosecuting those who disobey it, and in performing that duty he acts not merely in the local interest but in the name of the people of the State in compelling observance of its laws. In that enforcement, he is acting in a true sense as an officer of the State. Appellant sought to restrain his action in that aspect and hence we think that the case fell within section 266 of the Judicial Code and was properly heard by three judges.

Second. We pass to the question whether the bill of complaint stated a cause of action within the equitable jurisdiction of the District Court.

The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500. See, also,

In re Sawyer, 124 U. S. 200, 209-211; *Davis & Farnum Manufacturing Co.* v. *Los Angeles,* 189 U. S. 207, 217. To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. See *Terrace* v. *Thompson,* 263 U. S. 197, 214; *Packard* v. *Banton,* 264 U. S. 140, 143; *Tyson* v. *Banton,* 273 U. S. 418, 428; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 452; *Ex parte Young,* 209 U. S. 123, 161-162. We have said that it must appear that "the danger of irreparable loss is both great and immediate"; otherwise, the accused should first set up his defense in the state court, even though the validity of a statute is challenged. There is ample opportunity for ultimate review by this Court of federal questions. *Fenner* v. *Boykin,* 271 U. S. 240, 243, 244.

Appellant's bill of complaint failed to meet this test. Appellant alleged that the District Attorney had applied to a magistrate of the city of New York for the issue of a summons directing the appearance of the appellant, to the end that an investigation should be made of a complaint against him for violation of the provisions of the "Motor Vehicle Retailing Code" and that an information charging violation should be drawn. He alleged that the District Attorney intended, unless restrained, to institute criminal proceedings. The state statute made any violation of the provisions of the code a misdemeanor punishable by a fine not exceeding $500 for each offense. The bill contained general allegations of irreparable damage and deprivation of "rights, liberties, properties, and immunities" without due process of law, if the statute were enforced. But the bill failed to state facts sufficient to warrant such conclusions, which alone were not enough. The bill alleged that appellant had a large business in buying and selling motor vehicles, but the statute did not prohibit the continuance of that business and the bill gave no facts to show that the particular requirements of the code, which were in question, would create such a serious interference as to require equitable relief. Aside from the statement of general and unsupported conclusions, the case presented by the bill was the ordinary one of a criminal prosecution which would afford appropriate opportunity for the assertion of appellant's rights. So far as the bill disclosed, nothing more than a single prosecution was in contemplation, a point which the District Attorney emphasized by his disclaimer, on the hearing below, of any intention

to institute any further prosecution against appellant until his rights, constitutional or otherwise, had been adjudicated in the pending criminal proceeding.

The bill should have been dismissed upon the ground that it failed to state a case within the equitable jurisdiction of the District Court. The decree is modified accordingly, and, as modified, the decree is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.